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280	Shib Dutta Singh v. Karim Bakhsh	..	4 Pat. 320; (1925) A. L. R. (Pat.) 551.
282	Ali Muhammad Shah v. Gauri Shankar Lal	...	2 O. W. N. 430; (1925) A. I. R. (O.) 441; 12 O. L. J. 524 L. R. 6 A. (O.) 94.
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299	Bela Singh v. Lakshmi Das	..	(1925) A. I. R. (L.) 391; 6 L. 132.
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302	Jai Singh v. Darbara Singh	...	(1925) A.I. R (L.) 396; 6 L. 137; 1 L. C. 559; 7 L. L. J. 354.
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311	Nawab v. Emperor	..	(1925) A. I. R. (L.) 397; 26 Cr. L. J. 1335; 7 L. L. J. 279.
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320	Nga Po Than v. Emperor	...	3 R. 156; (1925) A. I. R. (R.) 277; 26 Cr. L. J. 1344.
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332	Ram Harakh v. Salik Ram	...	*Oudh Judicial Commissioner's Court.
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335	Deomal v. Khanoomal Jothmal	...	*Sind Judicial Commissioner's Court.
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345	Ganpati v. Salu	...	*Nagpur Judicial Commissioner's Court.
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367	Sheoram v. Soma	...	(1925) A. I. R. (N.) 460.
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380	Hari Sadhan Mitra v. Becha Lal	...	2 O. W. N. 581; (1925) A. I. R. (O.) 641.
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398	Akbar Hussain v. Emperor	...	8 N. L. J. 87; (1925) A. I. R. (N.) 294; 26 Cr. L. J. 1358.
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412	Ashiq Ali v. Ghulam Sarwar	...	(1925) A. I. R. (O.) 742.
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CALCUTTA HIGH COURT.
FULL BENCH.

CIVIL APPEAL No. 111 OF 1923.

April 21, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Hugh Walmsley, KT., Mr. Justice Rankin, Mr. Justice Buckland and Mr. Justice Mukerji.

FRANCIS HIGGINS PELL—PLAINTIFF—APPELLANT

versus

MINNIE GREGORY—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 181—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage decree—Application for personal decree—Limitation applicable—Letters Patent (Cal.), cl. 15—Court hearing appeals from Original Side, whether Division Court—Reference to Full Bench.

An application for a personal decree against a mortgagor under O. XXXIV, r. 6 of the C. P. C., is governed by Art. 181 of Sch. I to the Limitation Act:

Held, (by Division Bench), that a Court sitting to hear appeals from the Original Side is a Division Court within the meaning of the rule which lays down that whenever one Division Court differs from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision by a Full Bench. [p. 6, col. 1; p. 8, col. 2; p. 10, col. 1; p. 14, col. 2.]

Reference to a Full Bench made by Sanderson, C. J., and Walmsley, J., dated the 15th July 1924, preferred against a judgment of Greaves, J., in Suit No. 323 of 1911, dated the 28th May 1923.

ORDER OF REFERENCE TO A FULL BENCH.

Sanderson, C. J.—This is an appeal by Francis Higgins Pell against the judgment of my learned brother Mr. Justice Greaves which was delivered on the 28th of May 1923.

The suit was brought by S. A. Nathan and another against Minnie Gregory, and one Harry Jones Nathan and another were the mortgagees, Minnie Gregory was the mortgagor and Harry Jones was the puisne mortgagee of certain property, the details of which it is not necessary for me to mention. The appellant is the assignee of Harry Jones.

In the first instance the learned Judge made an order on the 8th of May 1923 in favour of the appellant against the defendant Minnie Gregory. But an application was made to him to vacate that order, and upon the hearing of that application the learned Judge delivered the judgment against which this appeal is directed. The learned Judge dismissed the application on the ground that the application was within Art. 181 of the Limitation Act of 1908 and was out of time.

The learned Judge in his judgment referred to the application as dated the 8th of March 1923. The notice of application was dated the 18th of April 1923. The mistake obviously arose by reason of the fact that the petition, on which his application was based, was sworn by the appellant on the 8th of March 1923. The correct date of application is the 18th of April 1923.

The application was that the cause title of the suit should be amended by striking out the name of Harry Jones and substituting the name of the applicant F. H. Pell in the place and stead thereof and that the defendant Minnie Gregory should be ordered and decreed to pay to the applicant a sum of Rs. 48,442, being the balance due under the preliminary and final decrees made in the suit and dated respectively the 28th day of July 1911 and the 8th day of July 1913 with interest. The latter part of this application was made under O. XXXIV, r. 6 of the C. P. C., 1908.

The facts which it is necessary for me to mention are as follows:—A mortgage suit was instituted on the 29th of March 1911

and there was a preliminary decree which was made by consent, dated the 28th of July 1911. The decree absolute for sale was dated the 8th of July 1913 and the sale took place on the 8th of June 1914. The preliminary decree which was in the usual form adopted in suits by a mortgagee against the mortgagor and a puisne mortgagee provided for the taking of accounts in the usual form and for sale in default of the amount found due being paid, and it contained the following passage:—"And it is further ordered and decreed with the like consent that if the money to arise by such sale shall not be sufficient for the payment in full of the amounts payable to the plaintiffs and the said defendant Harry Jones under this decree the plaintiffs or the said defendant Harry Jones, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance."

It is clear that so far as the plaintiffs were concerned it was intended that they should be at liberty to make an application under O. XXXIV, r. 6 of the C. P. C. Our attention was drawn to the fact that that order provides merely for a plaintiff obtaining a decree for recovery of the balance due from the mortgagor in the event of the money realized by the sale not being sufficient to pay the amount due to the plaintiff and it was urged that Mr. Jones, being a defendant, would not be entitled to make an application under O. XXXIV, r. 6, and that the appellant, his assignee, would be in no better position than Mr. Jones.

The learned Judge, however, came to the conlusion that inasmuch as the decree was made by the consent of the parties, it was not open to the mortgagor to contend that Mr. Jones or his assignee was not entitled to apply for a personal decree in pursuance of the preliminary decree, dated the 28th of July 1911, and on that point I agree with the learned Judge's conclusion.

The real point, which has been argued in this Court, is whether the application of the 18th of April, 1923, is barred by any article of the Limitation Act. It is to be noted that the sale took place on the 8th of June, 1914, and it could then have been ascertained whether the money to arise by the sale was sufficient to pay the amounts in full to the first and the second mortgagees. The fact was that the amount so realized was not sufficient to pay the amount due to the puisne mortgagee. Therefore, the right of the defendant Jones to apply for a personal decree against the mortgagor arose at that time.

It has been argued on behalf of the appellant that the article which is applicable to this application is Art. 183 which provides that where the application is "to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council, the period of limitation is twelve years and the time from which it begins to run is when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right." There is no doubt that if that Article is applicable to this case the application was made in time.

On the other hand it has been argued on behalf of the respondent that this application does not come within the terms of Art. 183 and that consequently Art. 181 applied. Article 181 applies to applications for which no period of limitation is provided elsewhere in this Schedule or by s. 48 of the C. P. C., 1908. The period of limitation is three years running from the time when the right to apply accrues. It is clear that if that Article applies to this application then the application was out of time.

The learned Counsel for the appellant has stated that there is no decision of this Court to the effect that Art. 183 would apply to an application under O. XXXIV, r 6.

The first question which this Court has to decide is whether it can be said that this application having regard to the facts of this case and the terms of the preliminary decree of 28th of July, 1911, can be said to be an application for the enforcement of a judgment, decree or order of this Court. In my judgment the argument of the learned Counsel for the appellant in this respect ought not to be accepted.

The preliminary decree of the 28th of July, 1911, did not contain a decree for the payment by the mortgagor personally of the balance which would be found due if the sale did not realize a sufficient sum to pay the amount due under the decree although, as the learned Counsel for the respondent pointed out, the decree might have contained such a provision in view of

the decision of the Privy Council in the case of *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (1).

The preliminary decree of the 28th of July, 1911, merely gave to the defendant Jones liberty to apply for a personal decree for the balance due. Having regard to the terms of the preliminary decree in this case, I am of opinion that the application of the 18th April, 1923, was really an application in the original suit for a new decree. I am confirmed in that opinion by the decision of the Allahabad High Court in *Mohmmad Iltifat Hossain* v. *Alimunnissa* (2). The result is that in my judgment Art. 183 does not apply to the application in question.

The question still remains whether Art. 181 applies. *Prima facie*, I should have thought that if Art. 183 did not apply then it must follow that Art. 181 would apply inasmuch as s. 48 of the C. P. C. is not applicable to this case and there is no other Article in the Schedule which is applicable.

But on this point I find that there is a decision of a Division Bench of this Court in the case of *Biswambhar Shaha* v. *Ram Sundar Kaibarta Das* (3) that Art. 181 does not apply to an application under O. XXXIV, r. 6.

With much respect to the learned Judges who decided that case, I am not prepared to agree with the conclusion at which they arrived.

The basis of the decision was that where there has been a preliminary decree in a mortgage suit with liberty to apply for a personal decree against the mortgagor in case the sale did not produce sufficient to satisfy the claim of the mortgagee, no exception by way of limitation would arise with the result that an application for a personal decree against the mortgagor might be more than twelve years after the right to apply for that decree accrued.

Apart from the decisions to which our attention has been drawn I should not be prepared to adopt that reasoning but I am relieved from any difficulty upon that point because the learned Counsel for the appellant frankly admitted that he could not support that reasoning in view of the decisions of the Privy Council.

It is due, however, to the learned Counsel to say that he did not admit that the above-mentioned reasoning was the sole ground of the decision in the case of *Biswambhar Shaha* v. *Ram Sundar Kaibarta Das* (3).

In my opinion the reasoning to which I have referred was the real ground of the decision and the result is, as I have already said, that I am unable to agree with the decision in that case. In my judgment Art. 181 applies to the application; consequently the application is barred by the Act of Limitation.

Inasmuch as my conclusion differs from the decision of two learned Judges of this Court, sitting in a Division Court, it is necessary to refer this case to a Full Bench, because the rule of this Court is as follows:—"Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the forces of law, the case shall be referred for decision by a Full Bench."

The learned Counsel for the respondent in the first instance submitted that it was not necessary for me to refer this to a Full Bench inasmuch as this Court is hearing appeals from a Judge of this Court sitting in the Original Side, and the learned Judge's decision in the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3)was given when they were hearing an appeal from a lower Appellate Court. At the end of the argument, however, he did not press that contention in view of the fact that this Court referred a case to a Full Bench in circumstances which were identical with those of the present case. I refer to the case of *Mani Lal Singh* v. *Trustees for the Improvement of Calcutta* (4). In that case my learned brother Mr. Justice Greaves, sitting on the Original Side, construed the provisions of a section of the Act in question in one way and the late Mr. Justice Mookerjee and my learned brother Mr. Justice Cuming sitting on the Appellate Side construed the section in another way. When the appeal from Mr. Justice Greave's judgment came to this Appeal Court, this Court was of opinion that the view which Mr. Justice Greaves expressed was right and Mr. Justice Woodroffe, Mr. Justice Chitty and I who were mem-

(1) 49 Ind. Cas. 620; 46 I. A. 294; 47 C. 370; 23 C. W. N. 490; 36 M. L. J. 215; 17 A. L. J. 207; 25 M. L. T. 278; 29 C. L. J. 443; 21 Bom. L. R. 589; 10 L. W. 26; (1919) M. W. N. 347; 12 Bur. L. T. 80 (P. C.).
(2) 47 Ind. Cas. 562; 40 A. 551; 16 A. L. J. 437.
(3) 30 Ind. Cas. 719; 42 C. 294.
(4) 44 Ind. Cas. 770; 45 C. 343; 22 C. W. N. 1; 27 C. L. J. 1.

bers of the Appeal Court felt bound to refer the matter to a Full Bench.

The learned Counsel for the respondent drew our attention to cl. 15 of the Letters Patent and to the fact that this Court sitting to hear appeals from a Judge on the Original Side is a Division Court and in my opinion the matter clearly comes within the rule regarding a Reference to a Full Bench, to which I have referred.

This Court, therefore, having held that Art. 183 of the Limitation Act does not apply to the appellant's application for a decree under O. XXXIV, r. 6, differs from the decision in the case of *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3) upon the questions.

(1) Whether there is any period of limitation in respect of an application for a decree under O. XXXIV, r. 6.

(2) Whether Art. 181 of the Limitation Act applies to an application under O. XXXIV, r. 6, C. P. C., where no other Article applies and refers to the decision of a Full Bench, the question whether the case of *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3) so far as it decides that Art. 181 of the Limitation Act does not apply to an application under O. XXXIV, r. 6, C. P. C., was rightly decided.

Walmsly, J.—I concur.

Sir *Benode Mitter* (with him Messrs. *B. C. Ghose* and *S. C. Mitter*), for the Appellant.

Mr. *Pugh* (with him Mr. *Page*), for the Respondent.

JUDGMENT OF THE FULL BENCH.

Sanderson, C. J.—This a Reference by my learned brother, Walmsley, J., and me to a Full Bench.

The facts of the case are set out in the referring judgment and it is, therefore, not necessary for me to state them again.

My learned brother and I decided that Art. 183 of the Limitation Act of 1908 does not apply to the appellant's application for a decree under O. XXXIV, r. 6 of the First Schedule to the C. P. C., 1908.

We were of opinion that Art. 181 is applicable, but we found that there is a decision of a Division Bench of this Court, *viz.*, *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3) to the effect that Art. 181 does not apply to an application under O. XXXIV, r. 6. The basis of that decision was that, in a mortgage suit in which there has been a decree for sale and in which the plaintiff had his personal remedy at the date of the institution of the suit, no exception by way of limitation would arise with regard to an application under O. XXXIV, r. 6 and that such an application is not covered by Art. 181.

As my learned brother and I were unable to agree with the decision in the abovementioned case, we referred the matter to a Full Bench.

The Reference is as follows:—

"This Court, thorefore, having held that Art. 183 of the Limitation Act does not apply to the appellant's application for a decree under O. XXXIV, r. 6, differs from the decision in the case of *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3) upon the question:

"(1) Whether there is any period of limitation in respect of an application for a decree under O. XXXIV, r. 6.

" (2) Whether Art. 181 of the Limitation Act applies to an application under O. XXXIV r. 6, C. P. C., where no other Article applies, and, refers to the decision of a Full Bench—the question whether the case of *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3) so far as it decides that Art. 181 of the Limitation Act does not apply to an appliction under O. XXXIV, r. 6, C. P. C., was rightly decided. "

Having regard to the fact that my learned brother and I decided that Art. 183 did not apply and no question with respect thereto having been referred to the Full Bench, it might be said that it was not open to the learned Counsel, who appeared for the appellant on the Reference, to argue that Art. 183 did apply. He submitted however that his argument was that Art. 181 did not apply, because Art. 183 did apply, and the learned Counsel was allowed by the Court to argue the point.

The learned Counsel for the appellant admitted, in view of the decisions of the Judicial Committee of the Privy Council, that it was not open to him to argue that there was no period of limitation as was stated in *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3), but he argued that the application for a personal decree under O. XXXIV r. 6 was an application to enforce a judgment as being either a proceeding in execution or a proceeding for judicial relief under a decree, and consequently that Art. 183 applied.

On behalf of the appellant reliance was chiefly placed upon the decision in *Amolak Chand Parack* v. *Sarat Chandra Mukerjee* (5) which was affirmed by the Judicial Committee of the Privy Council in *Munna Lal Parack* v. *Sharat Chunder Mukherjee* (6).

In the first place it is to be noted that the argument in the above-mentioned case was that the application was "free from the law of limitation" to use the words of the learned Chief Justice; that is the argument which it has been admitted cannot be supported.

In the second place the learned Chief Justice pointed out that the decree in that case was "in a sense peculiar" for it included not only a decree for personal payment by the mortgagor but also a provision for sale of the property in default of payment. It was assumed, however, for the purpose of the judgment that the decree was within the Transfer of Property Act, and that it was a decree made under s. 88 of that Act; and the learned Chief Justice drew attention to the fact that if it were a decree under s. 88 of the Transfer of Property Act no further decree was necessary and that all that was required was, under s. 89, an order for sale.

The conclusion arrived at was that the application for the order for sale might be regarded as an application for the realization of the decree, and that being so it was not unfair to say that it was an application to enforce a judgment as being a proceeding in execution or a proceeding for judicial relief under a decree.

It was not contended that the present case is governed by the Transfer of Property Act, and it was argued on the basis that the Code of Civil Procedure is applicable.

It is, therefore, material to draw attention to the concluding portion of the learned Chief Justice's judgment in *Amolak Chand Parak* v. *Sharat Chandra Muherjee* (5) where he referred to the alterations created by the Code of 1908, and to the terms thereof, whereby it is now provided that the application which follows a preliminary decree is not for an order for sale, but for a decree for sale.

It is interesting to observe that in the report of the case in the Judicial Committee of the Privy Council [*Munna Lal Parrack* v. *Sarat Chunder Mukerjee* (6)] the interpretation placed upon that part of the learned Chief Justice's judgment is as follows: "The learned Chief Justice was also of opinion that if the decree had been an incomplete one, a further decree being required, then Art. 181 of the Act of 1903 would have barred the application, since the difficulties of applying the corresponding Article of the Act of 1877 to an application for an order to sell had been removed in the case of Art. 181 by the provisions of the C. P. C., 1908."

It is not necessary for me to express any opinion in this case upon the question whether that is a correct interpretation of the learned Chief Justice's judgment, and I do not express any opinion.

It is, however, clear, in my judgment, that the decision in the above-mentioned case is not any authority for the proposition advanced on behalf of the appellant that Art. 183 applies to an application under O. XXXIV, r. 6.

Further, it cannot reasonbly be argued, in my judgment, that there is any analogy between an application for a final decree for sale under O. XXXIV, r. 5 (2) and an application for a personal decree against the mortgagor for the balance if legally recoverable under O. XXXIV, r. 6.

In the case of the final decree for sale, O. XXXIV, r. 5 (2) provides that where such payment is not so made the Court shall on application made in that behalf by the plaintiff pass a decree that the mortgaged property be sold and that the proceeds of the sale be dealt with as is mentioned in r. 4. Rule 4 deals with the preliminary decree or sale, which in itself contains a direction for the sale of the property if the payment directed thereby is not made on or before the date specified in the decree (see Form 4 in First Schedule, App. D). In the case, therefore, of an application for a final decree for sale, if it is made within the specified time, it may be said that the Court is bound as a matter of course to make the final decree for sale if the payment, which has been directed by the preliminary decree is not made, and that the Court is merely giving effect to the order contained in the preliminary decree.

In the case of an application for a personal decree under O. XXXIV, r. 6 the position is different. The rule provides:

(5) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.
(6) 27 Ind. Cas. 683; 42 I. A. 88; 42 C. 776; 19 C. W. N. 561; 17 M. L. T. 120; 21 C. L. J. 118; 2 L. W. 282; 17 B. 408; 28 M. L. J. 470 (P. C.).

"Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

On such an application the Court has to be satisfied that the balance is legally recoverable from the defendant otherwise than out of the property sold, and if so satisfied the Court may pass a decree for such amount.

Form 11 of the First Schedule, App. D, is the form of a decree against the mortgagor personally. This read with the rule makes the point clear; the form contains the sentence "and whereas it appears to this Court that the defendant is personally liable for the said balance."

For these reasons, in my judgment the application under O. XXXIV, r. 6, dated the 18th April 1923, was an application for a new decree in the suit and it cannot be said to be an application for enforcing a judgment or decree within the meaning of Art. 183, and consequently Art. 183 is not applicable to an application under O. XXXIV, r. 6.

It was admitted by the learned Counsel, who appeared for the appellant, that if Art. 183 does not apply, Art. 181 must apply.

In my judgment, therefore, there is a period of limitation in respect of an application for a decree under O. XXXIV, r. 6, and the answer to the question submitted to the full Court should be as follows:—Article 181 of the Limitation Act does apply to such an application and the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3) in so far as it decided that Art. 181 of the Limitation Act does not apply to such an application, was not rightly decided.

Walmsley, J.—I agree with my Lord the Chief Justice.

Rankin, J.—The special facts of this case need not be again detailed but the facts which give rise to the single question argued before us may be stated as these:—

That the suit is a suit brought in 1911 to enforce a mortgage on the Original Side of this High Court. That by consent a preliminary decree for sale was made therein which provided that if the money to arise by such sale should not be sufficient the present appellant (mortgagee) should be at liberty to apply for a personal decree for the amount of the balance. That the present appellant made his application for a personal decree some nine years after the mortgaged property had been sold.

The application is made under O. XXXIV, r. 6 of the Code of 1908. Unless there is no period of limitation prescribed for such an application, or Art. 183 of the Limitation Act, 1908, applies, the present appellant is clearly out of time. Learned Counsel on his behalf disclaims and rejects the contention that no period of limitation has been prescribed. In that view it is clear that the case falls either under Art. 181 or Art. 183. If it falls under Art. 181 the appellant is too late. It is contended on his behalf that it falls under Art. 183, and this is the only contention which he desires to raise.

I am of opinion that the terms of Reference to the Full Bench do not preculde us from deciding as to the correctness of this contention. Having regard to the frame of the Schedule to the Limitation Act, it would be quite impossible to hold that Art. 181 is applicable without deciding that Art. 183 is not, or to hold (in the abstract) that there is a period of limitation prescribed without stating the Article or Articles by which it is prescribed. Whether it is ever right to decide a point of law on an hypothesis of law which may or may not be correct, may be doubted; but it would not be right in this case. The alternatives are to decide upon the applicaiblity of Art. 183 or to make no answer to the Reference. In my judgment we have jurisdiction to decide the question and should do so.

The appellant's argument is that an application under O. XXXIV, r. 6 is an application to enforce the preliminary or final decree for sale. He supports this argument by citing decisions to the effect that applications under s. 89 of the Transfer of Property Act for an order absolute come within the articles of the Limitation Act, which are now numbered 182 and 183. This argument from analogy takes us to debateable land. This High Court for years held that Arts. 182 and 183 did not apply to applications under s. 89. Other High Courts held that they did. In 1914, some years after the present Code had altered the aspect of the question, the Judicial Committee in two cases from Allahabad applied what

is now Art. 182 [*Batuk Nath* v. *Munni Dei* (7) and *Abdul Majid* v. *Jawahir Lal* (8)], Lord Moulton in the latter case describing the application under s. 89 as being "for an order absolute to sell the mortgaged properties, in other words, for an order directing enforcement of the order *nisi*." Meanwhile in 1911 this Court in *Amolak Chand Parak* v. *Sharat Chandra Mukherje* (5) dealt with a case in which a mortgagee applied for an order absolute for sale some 23 years after his suit had been decreed on the Original Side. The mortgagee's contention was that the case was governed by the Transfer of Property Act and that there was no limitation whatsoever. Treating the case as one outside the present Code, Jenkins, C. J., laid stress upon the fact that no further decree was requisite and that all that was required was an order for sale. He regarded the application as a petition for realization of the decree following Lord Davey in ; a previous case who had spoken of a similar proceeding as a matter of execution, *i.e.*, as if Art. 182 would cover it. It was held accordingly that in a High Court Art. 183 would apply. This case was affirmed in very general terms by the Judicial Committee in 1914 very shortly after the decision in the Allahabad cases already mentioned, *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6).

Now if there were good and reliable authority in cases under s. 90 of the Transfer of Property Act, for holding that applications thereunder were governed by the Articles now numbered 182 and 183, it would be unnecessary to trouble with analogies drawn from cases under s. 89. What was provided for by s. 90 was a decree and it has frequently been called a supplementary decree. It is true that at different times in Madras, *Mallikarjuandu Sethi* v. *Lingamurti Pantulu* (9) and in Allahabad *Durga Dai* v. *Bhugwat Prasad* (10) *Musaheb Zaman Khan* v. *Inayetullah* (11) and *Ram Sarup* v. *Ghaurani* (12), decisions have been given to the effect that an application under s. 90 is an application in execution, but these decisions never became accepted law, and decisions to the contrary were not lacking. In the case of *Purna Chandra Mandal* v. *Radha Nath Das* (13) these cases were dissented from, Mookerjee, J., expressly stating that "even if.....the view maintained by the other High Courts as to the true nature of an application under s. 89 were adopted, it seems to me that an application under s. 90 stands upon an entirely different footing." (page 148). Curiously enough in *Biswambhar Saha* v. *Ram Sundar Kaibarta Das* (3), the Court proceeded on the view that all application under s. 90 or r. 6 of O. XXXIV, was exactly parallel to an application under s. 89 or r. 3. The real question is which of these two views is right? The Allahabad High Court in 1918 [*Mohammad Iltifat Hossain* v. *Alimunnissa* (2)] decided that Art. 181 was applicable to O. XXXIV, r. 6, holding that such an application is one made in the original suit for a new decree and that it cannot be regarded as an application in execution. This is exactly the view taken by Mookerjee, J., of s. 90 in the case already cited and in my opinion it is the correct view both in substance and in form.

In India a mortgage does not necessarily import a personal obligation to re-pay. *Prima facie* this obligation is present in simple mortgages and of course in English mortgages. *Prima facie* it is not present in mortgages by conditional sale and in usufructuary mortgages. In each case the question is one of construction of the mortgage instrument and the personal liability to re-pay may become barred before the right of recourse to the mortgaged property is barred. In these circumstances a decree for sale made in a mortgage suit, unless it contains an express decision as to personal liability, is not in any way an affirmation that such liability exists or ever has existed. Even where it exists, the mortgagee is not in India allowed in a suit to enforce the security to have recourse to the personal covenant until he has first exhausted the security and given credit for its proceeds. This is the real meaning of s. 90 and of r. 6 of O. XXXIV, and this is very

(7) 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 104 (P. C.).

(8) 23 Ind. Cas. 619; 36 A 350; 18 C. W. N. 963; 12 A. L. J. 624; 16 Bom. L. R. 395; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

(9) 25 M. 214; 12 M. L. J. 279 (F. B.).

(10) 13 A. 356; A. W. N. (1891) 191; 7 Ind. Dec. (N. S.) 226.

(11) 14 A. 513; A. W. N. (1892) 80; 7 Ind. Dec. (N. S.) 698.

(12) 21 A. 453; A. W. N. (1899) 166; 9 Ind. Dec. (N. S.) 996.

(13) 4 C. L. J. 141; 33 C. 867

different from a mere claim to have the decree for sale enforced. Execution against the mortgagor's person or against his general assets cannot begin in the absence of any decision as to his liability. To decide that he is personally liable is not to enforce or execute a decree for sale. There seems to be no force in the contention that an application is to enforce a decree because it is made under a liberty to apply reserved by the decree.

This is the substance of the matter but in form there are, since the Code of 1908, still further difficulties in the way of the appellant's contention. I take it to be quite clear now that in the subordinate Courts an application for final decree for sale is governed by Art. 181 and not by Art. 182 [*cf.* *Gajadhar Singh* v. *Kishen Jiwan Lal* (14) and *Jowad Hussain* v. *Gendan Singh* (15)]. In *Amolak Chand's case* (5), Jenkins, C. J., whose authority is very special on this subject, observed:—"One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points:—First, whether an application for an order under s. 89 of the Transfer of Property Act was an application in execution or not; and, secondly, whether, if it was not an application in execution, Art. 181 constituted a bar on the ground that the application was one not contemplated by the C. P. C. And so it is now provided that the application which follows a preliminary decree for sale, is not for an order for sale, but for a decree for sale. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the C. P. C., so that it is no longer possible to contend that these applications are not under the provisions of the C. P. C."

Now before one gets to Art. 181 one must exclude Art. 182. How did the Code of 1908 settle in the negative the old controversy as to whether Art. 182 was applicable to s. 89 of the Transfer of Property Act? Entirely by the new provision as to preliminary and final decree—"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit" (s. 2). Accordingly, when it was provided by O. XXXIV, r. 5 that the application which follows on a preliminary decree for sale is not for an order for sale but for a decree for sale, all question of "execution" was removed. It was an undoubted part of the intentions of the Code of 1908 to prevent matters which might and should be decided in the suit from being left to Courts of execution.

It is now contended, as I understand, that applications for final decree are not in the subordinate Courts governed by Art. 182, but that in the High Courts they are governed by Art. 183. Indeed it is from this position that the whole argument on behalf of the appellant proceeds. It is not easy to wedge so great a difference in result between the words "for the execution of a decree" and the words "to enforce a decree." If a final decree for sale is necessary to dispose of the suit, the considerations applicable under Art. 183, which allows for indefinite revivor, seem strangely out of place. I am content to say that as at present advised I am in no way satisfied that Art. 183 does apply in a High Court to an application for final decree under O. XXXIV.

I concur in the answers proposed by the Chief Justice.

Buckland, J.—The substantial question to be decided, once that learned Counsel for the appellant has been permitted to argue. as has been done, that Art. 183 of the First Schedule to the Limitation Act is applicable, is whether that Article or Art. 181 prescribes the period of limitation for an application for a decree under O. XXXIV, r. 6 of the C. P. C.

It was held by the Judicial Committee of the Privy Council in *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6) that an application for an order absolute for sale under s. 89 of the Transfer of Property Act was within Art. 183.

Order XXXIV, r. 5, now takes the place of that section but in lieu of an order absolute it is provided that upon application made in that behalf by the plaintiff the Court shall pass a decree that the property be sold.

It is contended on behalf of the appellant that in substance there is no distinction between an application for a final decree under r. 5 and an application for a personal decree under r. 6 and that, therefore, upon the authority of the case cited above Art. 183 applies.

(14) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.
(15) 66 Ind. Cas. 790; 1 Pat. 444; 3 P. L. T. 329; (1922) Pat. 164; (1922) A. I. R. (Pat.) 205.

For the respondent it has been argued that the law has been altered by the C. P. C., and that in consequence *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6) is no authority for the appellant's contention. There is no need to consider this aspect of the case unless one first comes to the conclusion that applications under rr. 5 and 6 are such that no distinction can be made between them for the purpose of deciding which Article is the correct one to be applied.

For the principles of the decision in *Munna Lal Parrack* v. *Sarat Chunder Mukerji* (6) one must turn to the judgment of Sir Lawrence Jenkins, C. J., in *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (5) which their Lordships of the Judicial Committee affirmed by a judgment which is contained in a few lines of the report. There one finds:—"If, and so far as this can be regarded, in the words of Lord Davey as 'an application for realization of a decree,' it is not unfair to say that it is an application to enforce a judgment, as being either a proceeding in execution or a proceeding for judicial relief under a decree."

The language used is wide and at first sight might appear to cover the point with which we are now concerned. But if the appropriate rules of O. XXXIV are analysed it becomes clear that the analogy upon which the argument of learned Counsel for the appellant depends is barely superficial.

If an application under r. 6 is to be regarded as an application to enforce the preliminary decree made under r. 4, similarly to an application made under r. 5, the relation which decrees made under rr. 5 and 6 respectively bear to such preliminary decree becomes important. The preliminary decree proceeds upon the footing of r. 2, cls. (*a*), (*b*) and (*c*) and directs that in default of payment of the amount found due upon taking the account the property shall be sold and the proceeds shall be applied in paying such sum to the plaintiff. That decree is made after adjudication upon all question which can be determined prior to a sale to be held for the purpose of realizing the security, and nothing is left upon which adjudication for such purpose is requisite. Hence it is only to be expected that it should be provided by r. 5 (2) that the final decree shall be made upon the plaintiff's application. Once the amount due has been ascertained and the defendant is in default nothing remains to be done and the final decree for sale goes as a matter of course.

Though the relation of a decree under r. 6 to the preliminary decree under r. 4 is by no means the same as that which the decree under r. 5 bears to the preliminary decree yet the one has a relation to the other, that relation is due to the fact that by reason of the preliminary decree and proceedings subsequently taken there under the amount for which a personal decree may be made has been ascertained. Moreover, excluding cases where under O. II, r. 2 the plaintiff has been permitted to postpone a suit on his security, no personal decree may be made until the plaintiff has exhausted his rights under his security and to obtain it he must proceed as provided by O. XXXIV.

A decree made under r. 6 involves that the sale ordered by the final decree shall have taken place, for otherwise it would not have been ascertained whether there was any balance still due which could form the subject-matter of a decree under that rule. The preliminary decree has been succeeded by the final decree, and without the interposition of the final decree, no decree under r. 6 for an ascertained sum could be made. I do not overlook the fact that a decree may take the form found in *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (1) but that does not affect the point under discussion. It is clear that the position is not, as suggested, that of there being two co-ordinate, even if not wholly concurrent, methods of enforcing the preliminary decree.

But there is the further difficulty that a decree under r. 6 involves an adjudication upon matters which up to that point have not been determined for it is not in every case of mortgage that a plaintiff has a right to a personal decree. The sum due to him no doubt has been ascertained but for the purpose of a decree under r. 6 matters have yet to be determined which would not have been relevant to an adjudication upon the plaintiff's rights against the property. Upon such further adjudication as the case may require a decree under r. 6 may be made but that is not by way of enforcing any existing judgment or decree. This to my mind is the explanation of the use of the word "may" in r. 6, which does not of itself necessarily exclude the application of Art. 183,

The same comment may be made on the argument that because the application is for a decree, Art. 183 cannot apply. Though the form of relief asked for may be a factor in determining the nature of the application it is not the sole or a conclusive factor when the real question is whether the application is to enforce an existing judgment or decree.

I concur with the learned Chief Justice in the replies to be given to the question referred.

Mukerji, J.--The facts of the case which has given rise to this Reference are clearly set forth in the Order of Reference and need not be re-capitulated. The question referred for our decision is whether the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3) so far as it decides that Art. 181 of the Limitation Act does not apply to an application under O. XXXIV, r. 6, C. P. C., was rightly decide. The learned Judges who have made this Reference differed from the decision in that case upon the following questions :—

1. Whether there is any period of limitation in respect of any application for a decree under O. XXXIV. r. 6; and

2. Whether Art. 181 of the Limitation Act applies to an application under O. XXXIV, r. 6, C. P. C., where no other Article applies.

Much of the contentions of the parties in the case proceed upon the analogy or otherwise as between an application under O. XXXIV, r. 5 (2), C. P. C., or rather what may be said to be its predecessor, that is to say, s. 89 of the Transfer of Property Act, and an application under O. XXXIV, r. 6, C. P. C. Consequently, it is necessary to examine the state of the law as regards limitation which relates to the former.

There were conflicting decisions on the question as to whether an application for an order absolute for sale under s. 89 of the Transfer of Property Act was governed by Art. 178 or Art. 179 of the Limitation Act of 1877 or whether there was any period of limitation for such an application. These Articles corresponded to Arts. 181 and 182 of the Limitation Act of 1908. The preponderance of authority was in favour of the view that such an application was not governed by any Article of the Limitation Act; see *Ajudhia Pershad* v. *Baldeo Singh* (16), *Tiluck Singh* v. *Parsotein Proshad* (17), *Tara Prosad Roy* v. *Bhobodeb Roy* (18), *Akikunnissa Bibee* v. *Roop Lal Das* (19), *Ranbir Singh* v. *Drigpal* (20), *Mahabir Prasad* v. *Sital Singh* (21), and *Baimanekbai* v. *Manekji Kavasji* (22). For a contrary view reference may be made to the cases of *Oudh Behari Lal* v. *Nageshar Lal* (23), *Chunni Lal* v. *Harnam Das* (24) and *Bhagwan Ramji* v. *Ganu* (25).

The former view proceeded mainly upon three propositions.

Firstly, that such an application was not one under the C. P. C., to which only Art. 178 applied:

Secondly, that it relates to an action which the Court ought to take of its own motion whether the party applies or not; and

Thirdly, that it is not an application for the execution of a decree, because until the order absolute was made under s. 89 of the Transfer of Property Act, there was no decree capable of execution, and it was of the nature of an application in a pending suit the cause of action for which arose from day to day until the suit was at an end.

To take the last ground first, the Privy Council in the case of *Harendra Lal Roy Chowdhury* v. *Maharani Dasi* (26) took the view that an application under s. 89 was a petition for realization of the decree by the sale of the mortgaged properties. In so far as it could be so regarded, "it was," to quote the words of Sir Lawrence Jenkins, C. J., "not unfair to say that it is an application to enforce a judgment, as being either a proceeding in execution of a decree or a proceeding for judicial relief under a decree," *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (5). This was a case in which the decree had been passed by the High Court and it was held in the case that the application came under Art. 183 of the Limitation Act of 1908. An appeal was preferred to the Privy Council

(16) 21 C. 818; 10 Ind. Dec. (N. s.) 1176.

(17) 22 C. 924; 11 Ind. Dec. (N. s.) 612.

(18) 22 C. 931; 11 Ind Dec. (N. s.) 617.

(19) 25 C. 133; 13 Ind. Dec. (N. s.) 90.

(20) 16 A. 23; A. W. N. (1893) 198; 8 Ind. Dec. (N. s.) 16.

(21) 19 A. 520; A. W. N. (1897) 137; 9 Ind. Dec. (N. s.) 336.

(22) 7 B. 213; 4 Ind. Dec. (N. s.) 144.

(23) 13 A. 278; A. W. N. (1891) 83; 7 Ind. Dec. (N. s.) 174.

(24) 20 A. 302; A. W. N. (1898) 40; 9 Ind. Dec. (N. s.) 554.

(25) 23 B. 644; 1 Bom. L. R. 136; 12 Ind. Dec. (N. s.) 430.

(26) 28 I. A. 89; 5 C. W. N. 536; 28 C. 557; 11 M. L. J. 171; 8 Sar. P. C. J. 48 (P. C.).

against this decision but it was dismissed; *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6). An application for an order absolute under s. 89 has also been held by the Judicial Committee to be an application for the execution of the preliminary decree or decree *nisi* under s. 88, *Batuk Nath* v. *Munni Dei* (7) and *Abdul Majid* v. *Jawahir Lal* (8) and so governed by Art. 179 of the Limitation Act of 1877, and in the latter case an application for an order absolute for sale under s. 89 was treated as an application for directing enforcement of the order *nisi*. The third ground, therefore, can no longer be maintained as sound.

Then as to the second ground, if the application be one for the execution of the decree *nisi* or for enforcement of a relief granted thereby, it stands to reason that it is optional with a party to seek for it or not. In this connection I entirely agree with the opinion expressed by Coxe, J., in the case of *Beni Singh* v. *Barhamdeo Singh* (27) where he observed as follows:—"Under O. XXXIV, r. 5 the Court, not only is not bound to proceed with the case, but cannot do so unless an application is made to it. The parties are at perfect liberty to drop the proceedings,...the Court has no jurisdiction to direct the sale."

As regards the first ground, the provision as to mortgage suit having been removed from the Transfer of Property Act to the Code of Civil Procedure, 1908, it is no longer possible to contend that applications of this class are not under the provisions of the C. P. C.

Some of the results of the decisions of the Judicial Committee referred to above may thus be summed up:—The preliminary decree or decree *nisi* passed under s. 88 of the Transfer of Property Act is executable, in order to obtain the order absolute under s. 89 steps have to be taken in execution; and to such an application Art. 182 or Art. 183 will apply as the decree happens to be of a *mofussil* Court or of the Original Side of the High Court [*Mohammad Husain Saib* v. *Abdul Kareem Saib* (28).] The result attained by the transference of the provisions of the Transfer of Property Act relating to suits on mortgages into O. XXXIV of the C. P. C., 1908 and the amendments made by requiring a decree for sale to be passed in O. XXXIV r. 5 (2) instead of an order absolute for sale in s. 89 and the distinction made in the explanation to the definition of "decree" as contained in s. 2 as between a preliminary and a final decree has been to make, in the case of a *mofussil* decree, Art. 181 applicable instead of Art. 182 to an application for a decree for sale under O. XXXIV, r. 5 (2), C. P. C., such an application being an application in the suit for a final decree and not an application for execution [*Gajadhar Singh* v. *Kishen Jiwan Lal* (14)].

Similar conflict existed as to the period of limitation, if any, for a decree for the balance under s. 90 of the Transfer of Property Act. In Allahabad the view was taken that an application to obtain a decree under s. 90 cannot by any straining of language be considered to be an application for the execution of a decree under s. 88; that it is an application for a subsidiary decree, that it is undoubtedly an application in execution proceedings but is not an application for the execution of the principal decree, and that Art. 178 of the Limitation Act of 1877 applied to it; *Ram Sarup* v. *Ghaurani* (12) and the cases cited in the judgment in that case. In *Mohammad Iltifat Husain* v. *Alimunnissa* (2) it has been held that an application under O. XXXIV, r. 6, C. P. C., is not one for the execution of the original decree for sale but is an application in the original suit for a new decree. This Court in the case of *Rahmat Karim* v. *Abdul Karim* (29) held that that Article was not applicable as the application was not under the C. P. C. In the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3) which was a case decided under the Code of 1908, it was contended that the decision in the case of *Rahmat Karim* v. *Abdul Karim* (29) could no longer be regarded as good in view of the transference of the provisions relating to mortgage suits from the Transfer of Property Act to the C. P. C. in 1908. This contention was overruled on the authority of certain observations contained in the decision of *Madhab Moni Dasi* v. *Pamela Lambert* (30). In that case it was laid down that previous to the passing of the Limitation Act (IX of 1908) and the C. P. C. (Act V of 1908) there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under s. 86

(27) 28 Ind. Cas. 211; 22 C. L. J. 66; 19 C. W. N. 473.
(28) 29 Ind. Cas. 237; 39 M. 544; 17 M. L. T. 424.
(29) 34 C. 672; 6 C. L. J. 119; 11 C. W. N. 674.
(30) 6 Ind. Cas. 537; 37 C. 796; 15 C. W. N. 337; 12 C. L. J. 328.

of the Transfer of Property Act (IV of 1882) that the Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever, that it does not apply to an application to a Court to do what the Court has no discretion to refuse and that it is not applicable to an application to the Court to terminate a pending proceeding the final order in which had been postponed for the benefit of the defendant or the conveninence of the Court. As regards these propositions it may be observed that the reasons that were given by the learned Judges as to why the Limitation Act (IX of 1903), should not be taken as applying to an application of this nature, can no longer be regarded as sound in the view that has been taken of an application under s. 89 as mentioned above, with regard to which it used to be held upon similar reasons at one time that no period of limitation was applicable. The judgment in the case after expressly stating that it was not necessary to decide whether the C. P. C. and Limitation Act of 1908 applied to the case or not, went on to lay down that Art. 181 of the Limitation Act of 1908 did not govern an application for order absolute under O. XXXIV. r. 3 of the C. P. C. of 1908. This part of the decision, therefore, was clearly *obiter*. The learned Judges who decided the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3), were of opinion that what had been held in *Madhab Moni Dasi's case* (30), to apply to O. XXXIV, r. 3 was also applicable to O. XXXIV, r. 6 as both the cases were strictly parallel and the rule of law and justice which was the *ratio decidendi* applied equally to both the cases. The decision in the case of *Bishwambhar Saha* v. *Ram Sunder Kaibarta Das* (3) is founded upon the observations in *Madhab Moni Dasi's case* (30), to which I have already referred and which for the reasons I have given cannot now be regarded as sound.

Thus then we arrive at the conclusion that it is no longer possible to contend that there is no period of limitation for an application under O. XXXIV, r. 6 just in the same way as it cannot be contended that there is none for an application under O. XXXIV, r. 5 (2). The application is governed by the Limitation Act; and s 48 of the C. P. C. not applying to it, Art. 181 would apply unless some other Article applies.

Sir Benode Mitter appearing for the appellant conceded that he was unable to contend that there was no period of limitation in respect of an application for a decree under O. XXXIV, r. 6. He however contended that Art. 181 was not applicable because Art. 183 applied to the case.

The question referred to us is not whether the decision in *Biswambhar Saha's case* (3), in so far as it decides that there is no period of limitation for such an application, is right. If that was the question we might have answered it without any further discussion. The question is whether that decision is right in so far as it says that Art. 181 does not apply. To decide this question we must go further and decide whether Art. 183 applies or not; for s. 48, C. P. C. admittedly not applying, we must find that no other Article applies, and Art. 183 is said to be the only Article which applies.

Article 183 runs thus:—"To enforce a judgment, decree or order of any Court established, by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction or an order of His Majesty in Council."

To attract the operation of this Article there must be a judgment, decree or order capable of being enforced; and the real question, therefore, is whether an application for a decree under O. XXXIV, r. 6 is one for enforcing the preliminary decree passed under O. XXXIV, r. 4. It is contended that the relation between a decree under r. 4 and one under r. 5 (2) is the same as between a decree under the former rule and one under r. 6, and it is urged that if an application for a decree under r. 5 (2) may be regarded as one for enforcement of the judgment or decree under r. 4, as it must be in view of the decision in *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (5), affirmed by the Judicial Committee in *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6), an application for a decree under r. 6 must also be similarly regarded. It is urged that if there is no liberty reserved in the preliminary decree for applying for a decree for the balance, that relief must be treated as having been refused and would be barred in view of s. 11, Exp. 5 of the Code; and that, therefore, when the mortgagee makes the application for a decree under r. 6 he exercises the liberty granted to

him by the judgment or decree previously passed and is, therefore, enforcing the same.

Now, we are not concerned in the present case with a decree of the character that was before the Judicial Committee—a combined decree not following the forms in the Appendix in the First Schedule to the Code in the case of *Jeuna Babu* v. *Permeshwar Narayan Mahtha* (1) and we are not in the present case concerned with those considerations which may perhaps arise in the case of such combined decree. The relevant passage in the decree before us runs in these words:—"And it is further ordered and decreed with a like consent that if the money to arise by such sale shall not be sufficient for the payment in full of the amounts payable to the plaintiff and the defendant Harry Jones under this decree the plaintiff or the defendant Harry Jones as the case may be shall be at liberty to apply for a personal decree for the amount of the balance." Now the forms prescribed in the Appendix D of the First Schedule of the C. P. C., for a preliminary decree for sale and a decree for balance are respectively Forms Nos. 4 and 11.

Form No. 4 runs thus:—It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is rupees and that such amount shall carry interest at the rate of per cent. per annum—until realization, and it is decreed as follows:—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him (where the plaintiff claims by derived title add "or by those under whom he claims"). (Where the plaintiff is in possession add "and shall put the defendant in possession of the property").

(2) That if such payment is not made on or before the said day of 19 , the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Form No. 11 runs thus:—Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19 , and now in Court to the credit of this suit, amount to Rs. Y, and there is now due to the plaintiff the sum of Rs. X...interest thereon at the rate of 6 per cent. per annum from the day of 19 , to this day, and also the sum of Rs. for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. Z. And whereas it appears to this Court that the defendant is personally liable for the said balance.

It is hereby declared as follows:—

(1) That the said sum of Rs. Y be paid out of Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. Z with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

It is clear from these forms as well as the rr. 4, 5 and 6 of O. XXXIV that the decree passed under r. 4 directs that in default of the defendant paying in accordance with the decree mentioned in cls. (*a*), (*b*) or (*c*) of r. 2 the Court shall pass a decree for sale and also directing that in default of the defendant paying as mentioned therein, the mortgaged property or a sufficient part thereof be sold and the direction thus given takes effect on the happening of the contingency, and when the contigency happens it is obligatory on the Court to pass a decree under r. 5 (2). Under a decree passed under r. 4 a liberty is also reserved to the plaintiff to apply for a decree under r. 6. When such an application is made the question whether such a decree should or should not be passed has to be decided. It is not as if the latter decree has to be passed as a matter of course: it has to be found that the net proceeds of the sale held under the decree under r. 5 are insufficient and that the

balance is legally recoverable: and this may give rise to such questions as to whether the mortgagor is under a personal liability or whether the mortgagee is not precluded by the terms of the mortgage from realizing his dues otherwise than out of the property sold or whether the right to enforce such liability has been extinguished by the Statute of Limitations at the time the suit was instituted. The relations, therefore, as between decrees under r. 4 and under r. 5 (2) and as between decrees under the former rule and under r. 6 are fundamentally different. In one case it is an enforcement of the decree or the judgment previously passed, and in the other case though the mortgagee comes under the decree to avail of a liberty, he seeks to obtain something which the previous decree did not give him. He comes to enforce a right or seek a relief which he had independently of the previous decree. He comes under the previous decree only in the sense that the right or relief has been put off by it until the happening of certain events. Seeking to avail of a liberty for applying for a relief is different from enforcing a judgment or decree; the judgment or decree not having granted the relief but only the liberty to apply for it.

As regards the contention that the right is created by the decree because in the absence of a liberty reserved thereby the right to make an application for a decree under r. 6 is lost to the mortgagee, there is authority for the proposition that the Court cannot refuse an order under this rule simply because no provision is made for it in a decree for sale: *Sonatun Shah* v. *Ali Newaz Khan* (31) and *Musaheb Zaman Khan* v. *Inayat-ul-lah* (11). Those cases were decided when Exp. III to s. 13 of the C. P. C. of 1882, corresponding to Exp. V of s. 11 of the present Code was in force. This explanation, in my opinion, does not stand in the way, for the proper time for granting the relief according to the rules is only after the conditions requisite for a decree under r. 6 come into being. The position of course would be different if the issue has been considered and granted or refused at the time of the first decree. For these reasons I am of opinion that the application is not one for enforcing a decree or judgment or order and is not governed by Art. 183.

(31) 16 C. 423; 8 Ind. Dec. (N. S.) 278.

That being so, in my opinion, Art. 181 must apply to such an application; and in so far as the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3) decided that it did not, it was not rightly decided.

Sanderson, C. J.—The result is that in pursuance of the provisions of r. 2, Chap. VII of the High Court Rules, we return the case with an expression of our opinion upon the point of law referred to the Full Bench, for final adjudication by the Division Court which referred it.

The appellant must pay to the respondent her costs of this Reference.

Z. K. *Case returned.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 52 OF 1924.

February 25, 1925.

Present:—Mr. Baker, J. C.

DINA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GUJABA—DEFENDANT No. 2—RESPONDENT.

Specific Relief Act (I of 1877), s. 27—Agreement of sale—Suit for specific performance—Decree—Intermediate conveyance, whether binding on vendee.

Where a suit for specific performance of a contract to sell immoveable property is decreed the title of the decree-holder relates back to the date of the agreement, on which the suit is based, and the decree cannot be rendered nugatory by any intermediate conveyance. [p. 15, col. 1.]

A mortgage executed by a vendor after the date of the agreement to sell, the mortgagee taking with notice of the agreement, is not, therefore, binding on the vendee who subsequently obtains a decree for specific performance of the agreement. [p. 17, col. 1.]

Joharmull Bhutra v. *Bhupendra Nath Basu*, 67 Ind. Cas. 108; 49 C. 495; 34 C. L. J. 79; (1922) A. I. R. (C.) 412, followed.

Appeal against a decree of the Subordinate Judge, Balaghat, dated the 31st January 1924, in Civil Suit No. 57 of 1923.

Mr. *Abdul Rahim Khan*, for the Appellants.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The plaintiffs, who are mortgagees from one Bhiku Patel of an 8-annas share in *Mouza* Budbuda, *mahal* No. 5, and of 1 anna 4-pies share in *Mouza* Narodi, sued for foreclosure of the mortgage. Defendant No. 2, Gujaba, who is the contending defendant in this case, is a pur-

chaser from Bhiku for his 1-anna 4-pies share in *Mouza* Narodi by a contract made previous to the defendant No. 1's mortgage. The date of the mortgage is 16th June 1917. As Bhiku did not execute the sale-deed, the defendant No. 2 sued him for specific performance in Suit No. 31 of 1917 and obtained a decree on 24th October 1917 for specific performance; and a sale-deed was executed, Gujaba being already in possession under the previous mortgage.

The lower Court held that the plaintiffs' mortgage was not binding on defendant No. 2 as the plaintiffs took their mortgage with notice of the previous contract of sale between the mortgagor Bhiku and the defendant No. 2. Their claim against him was, therefore, dismissed and a decree passed against defendant No. 1 only as he admitted the claim. The plaintiffs appeal.

Although the judgment of the lower Court is long and the record is bulky, the only question in this case is comparatively simple one. We are not concerned with the mortgage of the 8-annas share of the other village Budbuda, nor are we in this appeal concerned with the question of the redemption by the plaintiffs of the defendant No. 2's previous mortgage of the share of 1-anna 4-pies share of *Mouza* Narodi, because although the lower Court has gone at some length into that question it has finally held in para. 15 of its judgment that "the plaintiffs have not only not paid Court-fee stamp on the claim for redemption but they have not filed any written statement containing that claim, nor is the plaint amended so as to include that claim." We are, therefore, not concerned with this point, and the sole question in this appeal, which is comparatively a simple one, is whether at the date of the plaintiffs' mortgage there was a subsisting contract for sale between the mortgagor Bhiku and the present respondent Gujaba.

Gujaba obtained a decree for specific performance of that contract of sale on 24th October 1917, but it is settled law that title in the case of a suit for specific performance relates back to the date of the agreement on which the suit is based and the decree cannot be rendered nugatory by intermediate conveyances : *cf. Joharmull Bhutra* v. *Bhupendra Nath Basu* (1).

(1) 67 Ind. Cas. 108; 49 C. 495; 34 C. L. J. 79; (1922) A. I. R. (C.) 412.

It is also admitted in the present case, that the contract to sell 1-anna 4-pies share of *Mouza* Narodi to defendant No. 2 was made in 1916 prior to the plaintiffs' mortgage. According to the defendant it was made about the 30th of August 1916. It has been contended on behalf of the plaintiffs that it was made in November 1916, this being based on the fact that the defendant has admitted in his deposition that the agreement was that an application for sanction to transfer the *sir* land should be made within a week after the contract and as the defendant Bhiku's application to the Deputy Commissioner for sanction to transfer the *sir* is dated 28th November 1916 (Ex. P-18), it is argued that the contract must have been made a week before that time. I do not myself see that it makes much difference in this case, whether the contract was made in August 1916 or November 1916, as in either case it would be before the plaintiffs' mortgage, although the learned Pleader for the appellants has argued at some length that it does make a difference because at the time the contract was made Bhiku was pressed by creditors and, therefore, it was necessary that Gujaba should pay the money as soon as possible in order to relieve Bhiku from his difficulties, and the contract fell through because he did not do so.

It has been argued on behalf of the respondent that the defendant Gujaba had no knowledge as to when the application for sanction to transfer the *sir* was made by Bhiku and, therefore, it cannot be said that the contract took place only a week before the application was made. I do not propose to go into the evidence regarding the plaintiffs' knowledge of this contract, which has been sufficiently dealt with by the Subordinate Judge; there is ample evidence to show that. But there is a clear admission of plaintiff No. 2 (P. W. No. 8) to the effect that he knew that Bhiku had sold the share of Narodi to Gujaba and that the mortgage was executed because that agreement to sell was never carried into effect. This will be found at page 15 of the printed book in his examination-in-chief. It will be thus seen that the existence of the contract of sale between Bhiku and Gujaba is admitted and that it was to the knowledge of the plaintiffs.

The sole question in his appeal is whether the contract was in force at the date

of the mortgage, the plaintiffs' contention being that the defendant Gujaba had put an end to the contract by imposing impossible conditions, and that he was not in a position to pay the money, Rs. 4,000. It was, of course, held in Suit No. 31 of 1917 that the contract was in existence and Gujaba was given a decree for specific performance, but as the plaintiffs were not parties to that suit they admittedly are not bound by that decree and they are entitled to raise this contention.

It is contended that the lower Court is wrong in holding that this contention that Gujaba put an end to the contract in May 1917 by imposing the condition that Bhiku should take surrenders from the tenants of the *khudkasht* land, to whom *parchas* had been granted, which was an impossible condition, was never put forward in Suit No. 31, and reference is made to para. 7 of the judgment in that suit, which is Ex. No. 2 D-2. On reference to that judgment it will appear that in the written statement the defendant stated that on 24th May 1917 or on 25th May 1917 the defendant (Bhiku) met the plaintiff (Gujaba) at Balaghat and asked him to take the conveyance, but the plaintiff refused saying that he would pay Rs. 3,000 only, and finally in June refused to purchase the property. In para. 7 of that judgment it is stated that "the defendant alleges that plaintiff attempted on 24th May 1917 or on 25th May 1917 to vary the contract by offering Rs. 3,000 only" and that the final withdrawal was in June. Some reference is made to Gujaba wanting Bhiku to take surrender of some land from a tenant. It will appear that the case, now put forward that there was a definite rupture on 24th May 1917 because of the defendant Gujaba endeavouring to impose an impossible condition, was not put forward in the way in which it is now. In this connection it is particularly noteworthy that the extracts from the diary of Uderaj (P. W. No. 2), which are now put in showing that the contract was broken in May, were not put in, in that suit although Uderaj admits at page 8 of the paper book that the diary was then in his possession, but he did not then produce it in that suit and it was never mentioned. This is quite sufficient to dispose of the entries in the diary. Apart from this the Subordinate Judge has pointed out that they are themselves of a suspicious nature, as will also appear from the further statement of Uderaj in cross-examination.

The connection of defendant No. 2 and Bhiku had not begun with this contract of sale. There was a former contract in June 1914 for the sale of 8 pies out of the village share, and as this was not carried out Gujaba brought a suit for specific performance (No. 34 of 1915), which was compromised on 13th June 1916, when Bhiku passed to him a mortgage with possession, which is Ex. 2 D 7. Under the terms of that document the amount was to be paid within two months and subsequently the present contract of sale, which is oral and admitted by Bhiku and the plaintiffs and is further proved by Bhiku's application to the Deputy Commissioner, was entered into. The fact that there were certain negotiations going on between the parties as to the inclusion of the *khudkasht* land in the sale, does not show that the contract was broken or came to an end. If Gujaba had broken the contract and did not wish to purchase the share in May, as is the present contention, although in the former suit the final breach was alleged to have occurred in June, he would not have brought a suit for specific performance of the contract immediately afterwards, for that Suit (No. 31 of 1917) was decided on 24th October 1917.

As regards the allegation that the defendant No. 2 had not the money to pay Bhiku, there is evidence, which the lower Court has believed, that he took Rs. 1,600 of his own and Rs. 1,400 from one Dina Patel to Balaghat. In these circumstances I agree with the lower Court in holding that no reliance can be placed on the evidence adduced by the plainiffs as to the breaking of the contract at Balaghat in May, and that many of the witnesses do not appear to have been examined in the former suit and the entries in the diary were never mentioned, although they were in existence and would have formed a good defence to the suit by Gujaba for specific performance of the contract, which was strongly contested by Bhiku. In these circumstances I have no doubt that the lower Court was right in holding that the contract of sale between Gujaba and Bhiku, which is admittedly prior to the plaintiffs' mortgage and of which they admittedly had knowledge, was never put an end to by Gujaba and that it was the defendant Bhiku who was putting obstacles in the way of

the execution of the sale-deed by refusing to include the *khudkasht* land in it. This being so the law is perfectly clear.

The plaintiffs could only take and Bhiku could only convey such interest as he had in the property at the date of the transfer, and their mortgage is subject to the equities created in favour of Gujaba by the previous contract of sale. Gujaba's decree for specific performance creates in him a title relating back to the date of the agreement on which the suit is based. Whether that was in November 1916 or August 1916 is immaterial as in either case it is prior to the plaintiffs' mortgage which was in June 1917. The argument that time was of the essence of the contract and that the contract fell through because Bhiku required money immediately and Gujaba did not pay, does not carry much weight. The *sir* land could not be transferred without the sanction of the Deputy Commissioner; hence until that sanction was obtained the contract could not be completed by the execution of the sale-deed and the payment of consideration. The application for sanction to transfer was, as has already been stated, made on the 28th November 1916, and yet on the plaintiffs' case we find that negotiations between Bhiku and Gujaba were not broken off till May 1917, which is long after the sanction to transfer had been granted. The plaintiffs, who were not in possession of the property, could not have been made parties to the suit for specific performance of the contract and are entitled to challenge its existence even though they are representatives in interest of Bhiku. But the grounds on which this contract is challenged were not those on which Bhiku himself relied in defending the suit for specific performance, and, as I have already said, I attach much weight to the fact that the important evidence on which the plaintiffs now rely was not even produced in the former suit, though it was available to Bhiku, and has led me to discard it altogether.

The result is that the view of the lower Court appears to me to be quite correct. The defendant Gujaba is in no way bound by the mortgage to the plaintiffs. He is in possession of the land and his title cannot be defeated by any conveyances made by his vendor subsequent to the date of the contract of sale, on which he obtained a decree for specific performance. The suit against him was, therefore, rightly dismissed by the lower Court. The appeal fails and is dismissed with costs

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND EXECUTION OF DECREE APPEAL No. 6 OF 1925.

March 19, 1925.

Present:—Mr. Daniels, J. C.

CHHOTEY LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SOHRAB ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145—Attachment before judgment—Security for performance of decree—Dismissal of suit for default—Restoration—Surety, whether liable.

An attachment before judgment of the property of a defendant was released on security being given on his behalf. The surety hypothecated certain property for due payment by the defendant of any sum which might be decreed against him in the suit. If the defendant did not pay that sum in accordance with the Court's order the Court was given power to realize the amount from the surety by sale of the hypothecated property. On one of the dates fixed for the hearing of the suit neither party was present and the suit was dismissed in default. The plaintiff appeared shortly afterwards and the suit was restored on the same day without notice to the defendant. Eventually the suit was decreed on compromise:

Held, that the condition for which the security bond provided having come into existence the surety was liable for the payment of the decretal amount, and that the intermediate order of the dismissal of the suit followed by its restoration did not affect the liability of the surety. [p. 18, col. 1.]

Raj Raghubar Singh v. *Jai Indra Bahadur Singh*, 55 Ind. Cas. 550; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 42 A. 158; 46 I. A. 228; 13 L. W. 82 (P. C.), followed.

Abdur Rahaman v. *Amir Sharif*, 44 Ind. Cas. 229; 45 C. 780; 22 C. W. N. 927, distinguished.

Appeal against a judgment and decree of the District Judge, Gonda, dated the 10th December 1924, upholding that of the Subordinate Judge, Gonda, dated the 18th January 1924.

Mr. *A. P. Sen*, for the Appellants.

Mr. *H. Husain*, for the Respondents.

JUDGMENT.—The question in this appeal is whether a security bond given by the first respondent, Sohrab Ali Khan, for the due compliance by the judgment-debtor, respondent No. 2, with the decree that might be passed in the suit is enforce-

able or not. The difficulty has arisen by reason of the suit having been at one time dismissed for default but immediately afterwards restored. The claim was for Rs. 3,500. At the time of filing the suit the plaintiffs, who are the appellants in this Court, applied for attachment before judgment under O. XXXVIII, r. 5, C. P. C. Notice was issued to the judgment-debtor, and attachment before judgment was ordered, but on security being given on behalf of the judgment-debtor by the first respondent it was released. The terms of the security bond are important, as it is on them that the decision of the case depends. The terms of the deed are very clear. The surety hypothecated a *zemindari* share for due payment by the judgment-debtor of the sum which might be decreed against him in the suit. If the judgment-debtor did not pay that sum in accordance with the Court's order the Court was given power to realize the amount from the surety by sale of the hypothecated property. On one of the dates fixed in the case, 22nd February 1922, neither party was present in Court when the case was called on. It turned out, however, that the plaintiff was in attendance, but had been accidentally absent when the case was called on. On the very same day on which the order of dismissal was passed, he put in an application for restoration which was allowed without even issuing notice to the opposite party. It is probable that the case had already been restored before either the defendant or the surety knew that it had been dismissed.

Looking at the terms of the bond it is quite clear that the security was given for the performance of any decree which might be passed in the suit. The decree ultimately passed in the suit was a compromise decree awarding Rs 2,500. The conditions for which the security bond provided have come into existence and the surety is clearly liable. The intermediate order of dismissal followed by restoration cannot affect his liability. The Privy Council case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (1) is similar in principle though the actual facts were different. The case relied on by the Courts below, *Abdur Rahaman* v. *Amir Sharif* (2), was one of attachment before judgment, which was held to come to an end by the dismissal of a suit by the Trial Court and not to be revived by filing of an appeal. In this case I am dealing not with an appeal but with the ultimate decree of the Trial Court itself, and the case is not governed by O. XXXVIII, r. 9, but the terms of the security bond which clearly cover the facts before me. I accordingly allow the appeal, set aside the orders of both the Courts below and direct the Trial Court to restore the decree-holder's application for execution and proceed to dispose of it in accordance with law. The decree-holders will get their costs in this Court and the Courts below. Costs of the Trial Court will abide the result.

Z. K. *Appeal allowed.*

(1) 55 Ind. Cas. 550; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 42 A. 158; 46 I. A. 228; 13 L. W. 82 (P. C.).

(2) 44 Ind. Cas. 229; 45 C. 780; 22 C. W. N. 927.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 115 AND 116 OF 1924.

February 24, 1925.

Present:—Mr. Baker, J. C.

NARAYAN—PLAINTIFF—APPELLANT

versus

BEHARILAL—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 100, O. XXI, r. 90—Appeal, second—Contention given up in first appeal, whether can be raised—Execution of decree—Auction-sale set aside—Improvements by purchaser—Compensation, whether can be claimed—*Bona fides *of purchaser, whether relevant—Judgment-debtor, liability of.*

An appellant is not entitled to raise a contention in second appeal given up by him in the lower Appellate Court. [p. 19, col. 1.]

If a person enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon the sale being set aside irrespective of any question of his *bona fides*. [*ibid.*]

At any rate the good faith required in such a case is not anything more than an honest belief by the purchaser in the validity of his title. [p. 19, col. 2.]

Even under equity the judgment-debtor is liable to pay the costs of the improvements, as the sale having been set aside he will get the benefit of them. [*ibid.*]

Appeal against a decree of the District Judge, Nagpur, dated the 23rd November 1923, in Civil Appeal No. 74 of 1923.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *A. V. Wazalwar*, for the Respondent.

JUDGMENT.—These are cross-appeals arising out of the same judgment.

The facts are stated in the judgment of the lower Appellate Court. In consequence of the judgment of this Court setting aside the proceedings in execution of a decree, in which the judgment-debtor's, Narayan's, house was sold, the judgment-debtor applied to the First Court for restoration to possession and for mesne profits claimed in the form of rent. That Court, while holding the judgment-debtor was entitled to mesne profits, held also that interest on the amount of purchase-money was due from him, and set off one amount against the other, and, therefore, awarded him nothing as rent. That point was given up in appeal, but the judgment-debtor has made this second appeal to this Court against the order of the lower Appellate Court disallowing it.

The lower Appellate Court says: "I will not deal with the question of rent as it is disallowed by the lower Court and ground No. 4 which raised that question is not pressed." It appears, therefore, that the judgment-debtor gave up this contention in the lower Appellate Court. This being so, he is not entitled to raise it in this Court. His Appeal (No. 115 of 1924) will be dismissed with costs.

The other appeal is by the auction-purchaser and relates to the costs of the improvements to the house, which he claims to have made before restoring it to the judgment-debtor. The First Court allowed him Rs. 566-5-6. The lower Appellate Court, however, held that the improvements were not made *bona fide* and, therefore, disallowed them altogether, and found further that supposing them to be allowable the amount came to Rs. 395-5-6.

It is contended on behalf of the auction-purchaser that he was a stranger and no party to the proceedings. He began to make the improvements after the sale was confirmed and the application to set it aside dismissed and he was not bound to wait for the decision of the High Court in second appeal.

It has been held by the Madras High Court in *Mathunsa Rowthan* v. *Apsa Bin* (1) that if a man enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon a reversal of such judgment and sale irrespective of any question of his *bona fides*. This judgment deals with the whole law on the subject and states that even if the above proposition is too broadly stated, at any rate the good faith required does not go beyond an honest belief in the purchaser in the validity of his title.

The proceedings to set aside the sale had failed and it was only in this Court that the execution proceedings were set aside. Equity seems to be in favour of making the judgment-debtor to pay the costs of improvements, as he will get the benefit of them. I, therefore, vary the order of the lower Appellate Court by directing that the judgment-debtor should pay Rs. 396-5-6 before he gets possession.

With regard to the purchase money which the auction-purchaser has paid, he is, of course, entitled to get it back, but the question as to what has become of that money which is said to have been attached in execution by another creditor of the judgment-debtor has not been considered by the Courts below and I am not in a position to deal with it. The respondent will bear the costs of this appeal.

G. R. D. *Decree varied.*

(1) 12 Ind. Cas. 444; 21 M. L. J. 969; 19 M. L. T. 373; (1911) 2 M. W. N. 425; 36 M. 194.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1346 OF 1923.

June 19, 1925.

Present:—Mr. Justice Banerji.

BIR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GAJADHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 32—Occupancy holding—Suit for possession of portion of holding, whether maintainable.

A suit for possession of a portion of an occupancy holding by a person who alleges to be entitled to such portion is not maintainable in view of the provisions of s. 32 of the Agra Tenancy Act. [p. 21, col. 1.]

Achhey Lal v. *Janki Prasad*, 29 A. 66; 3 A. L. J. 735; A. W. N. (1903) 274 and *Ashiq Husain* v. *Asghari Begam*, 30 A. 90; 4 A. L. J. 809; A. W. N. (1908) 21, followed.

Najibulla v. *Gulsher Khan*, 1 Ind. Cas. 594; 6 A. L. J. 343; 31 A. 348, referred to.

Second appeal against a decree of the District Judge, Benares, dated the 23rd of July 1923

Mr. *Ram Nama Prasad*, for the Appellants.

Mr. *K. Verma*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal under the following circum-

stances :—The plaintiffs and the defendants are descended from a common ancestor Puranmashi. It appears that the parties are joint owners of severel occupancy holdings, and with respect to three of them, Nos. 436, 440 and 478 situated in *Mauza* Meohar in the District of Benares, the plaintiffs' allegation is that many years ago the parties, namely, the plaintiffs or their ancestors on the one side, and the defendants or their ancestors on the other, divided that holding among themselves, and that the plaintiffs' share in the occupancy was as set out in Sch. B and the defendants' as set out in Sch. C that the plaintiffs had in September 1922 been dispossessed by the defendants hence the plaintiffs were entitled to be awarded possession as their exclusive cultivatory holding. The defence raised to this claim was that the plaintiffs and defendants were joint and that there had been no partition whatever between the parties, and that the share of the plaintiffs was $\frac{1}{4}$. The defendants kept a discreet silence about their being in exclusive possession of that portion of the plots set out in Sch C. In para. 3 of the additional pleas in the written statement the defendants said that the plaintiffs have filed this suit without any right or authority, and that this suit is not maintainable. The parties went to trial and the issues that I am really concerned with in this appeal are Nos. 3 and 4, which are as follows :—

3. Did the disputed plots detailed in list B below the plaint come to plaintiffs on private partition between the parties, and are plaintiffs entitled to get possession over them with any damages and mesne profits, if so, what ?

4. Is the disputed property held in common by parties and have plaintiffs no right to claim separate possession of any share ?

The Munsif found in favour of the plaintiffs as to issue No. 3, and as regards the 4th issue also. The result was that he ordered the plaintiffs' suit for recovery of possession as prayed for to be decreed. I may mention that no issue was specifically framed or tried by the Trial Court with reference to the plea that the suit was not maintainable. The defendants went up in appeal and the learned Judge found that the plaintiffs' share in the holding was not $\frac{1}{2}$ but $\frac{1}{3}$rd. He further found that no legal partition of the family had taken place, and he dismissed the plaintiffs' suit. The plaintiffs have now come up in second appeal. The plaintiffs contend that the Court of first instance found in their favour, (1) that Puranmashi had two wives, and that the plaintiffs were descended from one and the defendants from the other, (2) that for at least 16 years before suit plots Nos. 430, 436 and 478 had been in exclusive possession in equal shares by the plaintiffs or their ancestors and the defendants or their ancestors, and further that this exclusive possession was so recorded until instructions were issued by the Board of Revenue, when the Revenue Authorities declined to enter such division in the revenue papers (3), that the two parties although holding themselves jointly responsible for the entire rent of the holding to the *zemindar*, contributed their *quota* of the rent and separately paid that to the *zemindar* though a receipt was granted in the name of all, (4) that the plaintiffs or their ancestors hypothecated such portions of the holding which were recorded in their names, and shortly before the alleged dispossession they separately redeemed the property and obtained possession and, lastly that the defendants had dispossessed them.

The findings of fact arrived at by the lower Appellate Court are admitted to be that the plaintiffs had failed to prove that Puranmashi had two wives, and further that no actual partition of the family property by metes and bounds had taken place. It was, therefore, contended by the learned Vakil for the appellants that these findings not traversing all the findings of the Court of first instance, could not be said to be such findings of fact as would throw their suit out of Court; that the partition considered by the Judge was a legal partition of property which was really capable of partition by metes and bounds, and certainly an occupancy holding was not such property about which there could be a suit for partition or a regular partition which could be recognized between the landlord and the tenants. He, therefore, submitted that I should frame further issues specifically on his possessory title and give him relief thereof.

The learned Vakil for the respondents does not admit that contention. He supports the decree of the Court below on the plea that a suit for possession of a $\frac{1}{2}$ share

of a holding is not maintainable in the Civil Court by reason of s. 32 of the Agra Tenancy Act. In support of his contention he has cited the case of *Achhey Lal* v. *Janki Prasad* (1) and the case of *Ashiq Husain* v. *Asghari Begam* (2). In the first case two points were decided, *viz.* :—

(1) That a suit for a declaration even was not maintainable—that has been overruled by the Full Bench case of *Najibulla* v. *Gulsher Khan* (3)—and the second point was that in view of s. 32 of the Agra Tenancy Act, a suit for possession of a portion of an occupancy holding was not maintainable, which has so far not been questioned, and it is impossible to distinguish the facts of that case from that of the present case.

With reference to the second case, although the facts are slightly different, I find that a Bench of this Court with reference to the contention put forward said: "It may be that the intention of the Legislature was to forbid the institution of a suit for the division of a holding as against the landlord only, but the language used in the said sub-section is general and does not give effect to any such intention". I am of opinion that this interpretation of s. 32 is binding on me.

The learned Vakil for the appellants contends that as a bar to s. 32 was not pleaded distinctly in the Courts below, the respondents ought not to be permitted to plead that bar now. Secondly that the present suit was not a suit for partition of a holding, but was a suit for possession of certain land of which the appellants had been illegally dispossessed, and in support of his contention he refers to the case of *Kedar* v. *Deo Narain* (4). He further contends that it is only when a person claims division of a holding and a division of land both together which would be binding on a landlord, that the Tenancy Act prohibits a suit. I am unable to accept his contention. I feel bound by the rulings I have set out above. The case of *Raghunath Kalwar* v. *Baladeen Kalwar* (5) referred to by Mr. Ram Nama Prasad, has really no bearing.

The result is that I dismiss this appeal with costs which will include fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 29 A. 66; 3 A. L. J. 735; A. W. N. (1906) 274.
(2) 30 A. 90; 4 A. L. J. 809; A. W. N. (1908) 21.
(3) 1 Ind. Cas. 594; 6 A. L. J. 343; 31 A. 348.
(4) 30 Ind. Cas. 89; 13 A. L. J. 919; 37 A. 656.
(5) 7 Ind. Cas. 398; 33 A. 143; 7 A. L. J. 918.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1011 OF 1922.

May 14, 1925.

Present:—Mr. Justice Adami and Mr. Justice Kulwant Sahay.

Maharaja KESHO PRASAD SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

LAKHNATH ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 3 (4), 88—Transfer of Property Act (IV of 1882), s. 105—Thicadar, *whether agent of landlord—Splitting up of holdings—Apportionment of rent—Consent of* thicadar *—Landlord, whether bound.*

A *thicadar* is not the agent of the landlord within the meaning of s. 88 of the Bengal Tenancy Act. He holds under a lease and he collects the money for himself and not for the landlord. [p. 22, col. 1.]

Where, however, a *thicadar* gives his consent in good faith for the benefit of the estate, to a splitting up of the holding under him, the apportionment of rent upon the new holdings is binding upon the landlord. [*ibid.*]

Mahamad Nazirul Hussain v. *Chuni Kamti*, 38 Ind. Cas. 706; 2 P. L. J. 151; 1 P. L. W. 229, followed.

Appeal from a decision of the District Judge, Shahabad, dated the 27th July 1922, confirming that of the Munsif, Arrah, dated the 6th August 1921.

Mr. *N. N. Sinha*, for the Appellant.

Mr. *Jagannath Prasad*, for the Respondents.

JUDGMENT.—The plaintiff in the suit out of which this second appeal arises sought to recover arrears of rent for the years 1324 to 1326 in respect of 31 *bighas*, 1 *katha*, 2 *dhurs* of land at a *jama* of Rs. 77-14-9 inclusive of cesses. The defendants in their written statement urged that the area of 31 *bighas* odd had been split up into separate holdings of which the various defendants were in occupation at certain rates of rent. The defendants further pleaded that they had each of them paid the rent due by them to the landlord.

It happened that in the year 1327 the plaintiff gave a *thica* lease of this holding to one Mr. Fox and it was during his *thica* that the area was split up into separate holdings. The plaintiff's claim was that he was not bound by the action of the *thicadar* in splitting up the holdings and was entitled to recover a lump sum of rent from all the defendants jointly in respect of the whole 31 *bighas*.

Both the lower Courts have rejected the plaintiff's claim holding that he was bound by the action of the *thicadar* and that a joint

suit against all defendants could not be maintained.

Mr. Nirsu Narain Singh puts forward the claim that s. 88 of the Bengal Tenancy Act applies, and frees the plaintiff from the obligation to stand by the splitting up brought about by the *thicadar*. Mr. Nirsu Narain Singh, in fact, contends that the *thicadar* was an agent within the meaning of s 88. It cannot, I think, be held that a *thicadar* is the agent of the landlord. He holds under a lease and he collects the money for himself and not for the landlord. Section 105 of the Transfer of Property Act defines a lease of an immovable property as a transfer of a right to enjoy such property, made for a certain time. As the leaseholder, the *thicadar*, can hardly be described as an agent. Furthermore under cl (4) of s 3 of the Bengal Tenancy Act the *thicadar* is a landlord.

But in this case we are bound by the decision of this Court in the case of *Mahamad Nazirul Hussain* v. *Chuni Kamti* (1) where it was held that consent by a *thicadar* given in good faith for the benefit of the estate to an alteration of the area of the holding under him and the apportionment of rent upon the new holdings is binding upon the landlord. In the present case the learned District Judge has found that there is no sign of any collusion between the *raiyats* and the *thicadar* or of any bad faith on the part of the *thicadar*.

It is then contended by Mr. Nirsu Narain Singh that a money-decree should be granted against the defendants and he refers us to the written statements where the defendants admit that they hold the split up holdings separately at certain rates of rent. He has not noticed, however, that the same statements put forward a plea of payment and under the circumstances no decree of the character he desires would be passed in the present case.

The appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 28 Ind. Cas. 706; 2 P. L. J. 151; 1 P. L. W. 229.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 26 OF 1925.

June 15, 1925.

Present:—Mr. Justice Sulaiman.

Sheikh HABIB BUX—APPLICANT

versus

SAMUEL FITZ AND CO. LD.—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXX, r. 10—Partnership—Sole proprietor, death of—Heirs, whether form partnership—Suit in name of old partnership, maintainability of—Document, proof of—Letter received by post—Presumption—Revision—Admission of inadmissible evidence—Irregularity or illegality.

Ordinarily when a Court acts on evidence which has not been proved or which is inadmissible, it does not act without jurisdiction. If it considers the question of the admissibility of a document and decides either that it is admissible or not admissible, then even though the decision may be wrong the Court does not act with material irregularity or illegality in the exercise of its jurisdiction. It merely commits an error of law. Where, however, the Court does not apply its mind to the question of admissibility at all and acts on a document which has not been proved or which is not admissible without considering whether or not it is admissible, it acts with material irregularity or illegality, in the exercise of its jurisdiction within the meaning of s. 115 of the C. P. C. [p. 23, col. 1.]

Shields v. *Wilkinson*, 9 A. 398; A. W. N. (1887) 44; 5 Ind Dec. (N. S.) 701 and *Chenbasapa* v. *Lakshman Ramchandra*, 18 B. 369; 9 Ind. Dec. (N. S.) 754, referred to.

Ordinarily a document is not proved by a mere *ex parte* affidavit, when the person trying to prove it does not submit himself to cross-examination. [p. 23, col. 2.]

When a letter is duly posted there may be a presumption that it reached the addressee in the ordinary course of business but the mere fact that a letter has been received through the post raises no presumption that it was despatched by the person on whose behalf it purports to have been written. [p. 24, col. 1.]

When the sole proprietor of a firm dies his heirs inherit the stock-in-trade, the outstanding dues and even the goodwill of the firm, but such heirs do not *ipso facto* become partners of the firm. Before a partnership can come into existence there must be an express or implied agreement between the heirs that the old firm should be continued. This agreement might be inferred from the fact that the firm is allowed to carry on business even after the death of the sole proprietor. But in the absence of any such evidence it cannot be presumed that the heirs of the deceased proprietor became partners of the new firm. Unless after the death of the sole proprietor, the firm carries on business which justifies a presumption that the heirs of the deceased are its partners, a suit cannot be instituted under O. XXX, r. 10 of the C. P. C. in the name of the old firm. That rule applies only where business is being carried on at the time when the suit is instituted. If business is not being carried on in that name at the time of the suit and the business has ceased to exist then all persons who are interested in the assets would have to be impleaded. [p. 24, cols. 1 & 2.]

Civil revision from an order of the Dis-

trict Judge, Jhansi, dated the 15th of December 1924.

Mr. *Baleshwari Prasad*, for the Applicant.

Mr. *U. S Bajpai*, for the Opposite Party.

JUDGMENT.—This is a civil revision from an order passed by the District Judge of Jhansi allowing an appeal in an execution matter and disallowing the judgment-debtor's objection.

The first point raised is that no appeal lay to the District Judge. This contention, in my opinion, has no force whatsoever. It is not disputed that the decree has been transferred for execution from the Bombay High Court to the Court at Jhansi. This was presumably under s. 39 of the C. P. C. An order passed by the Subordinate Judge in execution is not an order passed by a Court of Small Causes from which no appeal lies. A first appeal from his order clearly lay to the District Judge, *vide* the case of *Atwari* v. *Maiku* (1). Of course the decree having been passed by a Presidency Court of Small Causes in a case of Small Cause Court nature no second appeal lies even in the execution proceedings.

The next point urged is that the learned Judge has acted upon evidence which was neither formally proved nor admissible in evidence. The objection of the respondent is that assuming that this contention is correct no civil revision lies. Ordinarily when a Court acts on evidence which has not been proved or which is inadmissible in evidence, it does not act without jurisdiction. Furthermore, if a Court considers the question of the admissibility of a document and decides either that it is admissible or not admissible then even though the decision may be wrong, the Court does not act with material irregularity or illegality. It merely commits an error of law. But on the other hand if the Court does not apply its mind to the question of the admissibility at all and acts on a document which has not been proved or which is not admissible without considering whether or not it is admissible it acts with material irregularity or illegality in exercising its jurisdiction. In the case of *Shields* v. *Wilkinson* (2) it was laid down that to pass a a decree where there was no evidence at all to support it was an illegality. I may also refer to the case of *Chenbasapa* v. *Lakshman Ramchandra* (3).

In the present case the learned Subordinate Judge had found that on the date when the original suit was instituted the sole proprietor Rahim Bakhsh was dead. He further found that the concern which Rahim Bakhsh was carrying on ceased to exist at his death and that the heirs did not continue the old concern but started new concerns of their own though they adopted the same fictitious name (S. Johnson & Co.) which their father had assumed. He accordingly held that the decree obtained against Johnson & Co. was a decree against a dead person and was a nullity.

The learned Judge apparently felt the same difficulty as to the identity of the judgment-debtors but he considered that that difficulty was removed by a letter dated the 3rd of August 1922. The learned Judge commented on the omission of the First Court in neither admitting nor rejecting nor referring to it in its judgment. This apparently is the sole evidence in support of the identity of the judgment-debtors. The letter in question was not admitted by the judgment-debtors nor was it marked as an exhibit by the Court of first instance. No witness was produced in Court to prove its genuineness. When the appellant Habib Bakhsh was being cross-examined this letter was not put to him and he was not questioned about it all. The letter had been originally filed along with an affidavit dated the 11th of June 1924 but the entire statement in the affidavit with regard to this letter was that it was "the original received from the firm against which we seek to execute the decree."

Now, ordinarily documents are not proved by mere *ex parte* affidavits when the person trying to prove them does not submit himself to cross-examination. Of course under special circumstances affidavits under O. XIX may be allowed to be read in evidence, but even then if the opposite party *bona fide* desires the attendance of the witness for cross-examination he has to appear. But under r. 3 affidavits have to be confined to such facts as the deponent is able of his own knowledge to prove. The affidavit in question did not even state that the statements made therein were true according to the personal knowledge of the deponent; in fact the affidavit is not in strict ac-

(1) 1 Ind. Cas. 553; 5 A. L. J. 612; A. W. N. (1908) 254; 31 A. 1.

(2) 9 A. 398; A. W. N. (1887) 44; 5 Ind. Dec. (N. S.) 701.

(3) 18 B. 369; 9 Ind. Dec. (N. S.) 754.

cordance with the rules added by this Court to O. XIX. The letter accordingly had not been formally proved.

It is also doubtful how far the mere proof that such a letter was received by the addressee justifies a presumption that it is genuine. When a letter is duly posted there may be a presumption that it reaches the addressee in the ordinary course of business. But the mere fact that a letter has been received through post raises no presumption that it was despatched by the person on whose behalf it purports to have been written. If however it were proved that a previous letter was sent by the decree-holders' firm through post to the judgment-debtor and a reply thereto was duly received by the firm through post purporting to come from judgment-debtor the Court may under certain circumstances presume that it was a reply despatched on behalf of the judgment-debtor though not necessarily in his own handwriting. But here unfortunately the affidavit did not even mention that this letter was received in reply to any previous letter sent to the defendant firm.

I am, therefore, of opinion that there has been a material irregularity in the exercise of the jurisdiction inasmuch as the learned Judge without considering the question of admissibility has acted on this letter which had not been formally proved and which without further evidence would not have been admissible as a written acknowledgment of the judgment-debtors. If the learned Judge were satisfied that in consequence of some misunderstanding or otherwise there was sufficient cause for allowing fresh evidence to be produced he would have perfect jurisdiction to so order.

As I have to send the case back it is desirable to clear up one more point about which there may be some misapprehension. When the sole proprietor of a firm dies his heirs certainly inherit the stock-in-trade the outstanding dues and even the goodwill, but such heirs do not *ipso facto* become partners of the firm. When there was a sole proprietor there was no question of a partnership which must be between more than one person. On the death of the sole proprietor his heirs do not automatically become partners of the old firm but merely heirs to the assets of the deceased. Before a partnership can come into existence there must be an express or implied agreement between the heirs that the old firm should be continued. This agreement might be inferred from the fact that the firm was allowed to carry on business even after the death of the sole proprietor. But in the absence of any such evidence it would not be just to presume that the heirs of the deceased proprietor became partners of the new firm. Unless after the death of the sole proprietor the firm carries on business which justifies a presumption that his heirs are its partners a suit cannot be instituted under O. XXX, r. 10 in the old name of the firm. That rule will only apply when business is being carried on at the time when the suit is instituted. If business is not being carried on in that name at the time of the suit and the business has ceased to exist then all persons who are interested in the assets ought to be impleaded.

I accordingly allow this revision and setting aside the order of the lower Appellate Court send the case back to that Court for disposal according to law. Costs will abide the event.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1130 OF 1924.

February 19, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

NANDALAL ROY CHOUDHURY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUKUNDALAL DE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, powers of—Ends of justice.

Although the terms of O. XLI, r. 33, C. P. C., are very wide and confer on an Appellate Court wide powers for the purpose of making such decree or order as the exigencies of the case may require, still the powers should ordinarily be limited to those cases where as a result of the Appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience, or where, but for recourse to those powers, the ends of justice would be defeated. [p. 26, col. 2.]

Ganga Dhar Muradi v. *Banabashi Padihari*,, 24 Ind. Cas. 208; 22 C. L. J. 390 and *Shib Chandra Kar* v. *Dulcken*, 48 Ind. Cas. 78; 28 C. L. J. 123, relied on.

Appeal against a decree of the District Judge, Bakarganj, dated the 8th of February 1924, modifying that of the Subor-

dinate Judge, Second Court of that District, dated the 26th of September 1923.

Messrs. *Kunjilal, Herumbo Chandra Guha* and Babu *Prakash Chandra Pakrasi*, for the Appellants.

Babu *Suresh Chandra Talukdar*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for accounts instituted by the plaintiffs against the defendant who, it is alleged, was their manager, *Muktear* and Pleader at various times. A preliminary decree was passed by the Subordinate Judge of Backarganj who gave in that decree certain directions to a Commissioner to be appointed in order to ascertain the liabilities of the defendant. Those directions were to a certain extent modified by the learned District Judge on an appeal preferred from the said preliminary decree by the plaintiffs. There was another suit instituted by the defendant against the plaintiffs for certain sums of money alleged to have been due to him. With that suit we are not concerned in the present appeal. The appellants' objections in this appeal are two in number. The first objection relates to the directions which were given by the learned District Judge in connection with issue No. 6 in the suit. The issue runs in these words "Are the plaintiffs entitled to the papers mentioned in schedule *ga* to the plaint or any price thereof?" The papers in question were certain registers of suits, execution cases and establishment charges, certain copies of judgments and decrees, accounts for various periods, bills and vouchers and receipts for the payment of Government revenue. The defendant's case was that so far as the accounts were concerned they had already been furnished, that the bills were not in his possession and that the receipts had already been made over by him to the plaintiffs; and in short that he was not liable to make over any of these papers to the plaintiffs. The learned District Judge in his judgment states that these papers may be classified under two heads; firstly, papers which are alleged to be necessary for the settlement of accounts in the present suit, and secondly, papers which would be required by the *zemindars* for the future management of the estate. So far as the first kind of papers is concerned the learned District Judge was of opinion that upon the materials on the record it was not possible for him to say whether the defendant had submitted all the necessary accounts but he did not think it necessary to decide the point as it would be duty of the Commissioner to go into the matter and to decide against the defendant, where the latter had not produced accounts and vouchers in support of his claims. As for the second class of papers the learned Judge was not satisfied with the defendant's answer and he directed the defendant to submit all papers in his possession and all information that he could before the Commissioner, and he asked the Commissioner to state in his report whether what has been submitted is adequate and also whether the defendant should not be ordered to pay money compensation to the plaintiffs for what has not been supplied. After the report has been submitted by the Commissioner, the matter will necessarily be considered by this Court. On behalf of the appellants it is urged that the learned District Judge instead of directing the Commissioner to come to his decision on these points should have decided the matter himself. It will appear that the learned District Judge, upon the materials on the record, was unable to come to any decision; but he thought it necessary that there should be an investigation by a Commissioner who would submit his report before the Court finally decides the question. In our opinion there can be no objection to this. We are of opinion that there is no substance in this contention.

The next objection relates to the decision of issue No. 4 in the suit. That issue related to the liabilities of the defendant to submit his accounts from *Asar* 1324 to *Aswin* 1325. The learned Subordinate Judge decided as regards this issue, that the plaintiffs were entitled to a decree for accounts for this period. The learned District Judge has varied the direction of the Subordinate Judge and has held that the accounts from *Asar* 1324 till *Aswin* 1325 will be taken as being fully adjusted except as regards the item of Rs. 300 which does not appear to have been entered in the accounts and the learned District Judge has directed in his order that the Commissioner will have nothing to do with the accounts of this period except to consider the admissibility of this sum of Rs. 300. It is urged on behalf of the appel-

lants that the learned District Judge was wrong in treating the accounts as having been fully adjusted except as regards the sum of Rs. 300 and that he was not competent to vary the decision of the Subordinate Judge in this respect inasmuch as there was no appeal or cross-appeal before him on behalf of the defendant. With regard to this matter the findings of the Subordinate Judge are not very clear and in fact on a close examination of his findings it will appear that they cannot be easily reconciled. On the whole, however, it seems to us that what the Subordinate Judge found was this; that although the plaintiffs examined the accounts for this period and did not object to the items contained therein there was only a partial adjustment of accounts and there was no final adjustment thereof. The learned Subordinate Judge was of opinion that until the accounts were finally adjusted the plaintiffs were entitled to object to the accounts and to say that they were not correct. In that view of the matter he gave directions to the effect that the accounts for this period should not be held as having been finally adjusted and that, therefore, they should be taken. In our opinion there is no good reason for dissenting from the view taken by the learned Subordinate Judge in this respect; and upon the circumstances disclosed in his judgment it cannot reasonably be held that the accounts for this period were finally adjusted as between the parties in such a way that they may not be re-opened. In our opinion, the learned District Judge was not right in taking a different view. A contention was put forward on behalf of the appellants as to the jurisdiction of the learned District Judge to deal with this matter inasmuch as there was no appeal or cross-appeal before him on behalf of the defendant. As an answer to this contention the respondent relied upon the provisions of O. XLI, r. 33 of the C. P. C. as justifying the position that the learned District Judge had jurisdiction to modify a decisoin in this respect although there was no cross-appeal and reference was made to the case of *Tricomdas Coowerji Bhoja* v. *Gopinathji Thakur* (1) and to the case of *Tarini Charan Sarkar* v. *Bishun Chand* (2). Now the facts of both these cases are widely different from those of the present case, and the observations of their Lordships of the Judicial Committee can hardly be taken to mean that the provisions of O. XLI, r. 33, would apply to a case like the one before us. Although it cannot be gainsaid that the terms of O. XLI, r. 33 are very wide and that they do confer on an Appellate Court wide powers for the purposes of making such decree or order as the exigencies of the case or ends of justice may require, still, as has been held by this Court in the case of *Ganga Dhar Muradi* v. *Banabashi Padihari* (3), ordinarily the powers contained in r. 33. O. XLI should be limited to those cases where as a result of the Appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. It has also been laid down by Mookerji, J., in the case of *Shib Chandra Kar* v. *Dulcken* (4), on a review of the cases on the point that the provisions of this rule should be cautiously applied and should only be applied to cases where, but for recourse to it, the ends of justice would be defeated. In our opinion, this is not a case in which the District Judge was justified in resorting to the provisions of O. XLI, r. 33 for the purposes of varying the decision of the Subordinate Judge in this respect. This contention put forward on behalf of the appellants, therefore, succeeds. The appeal, therefore, succeeds in part. The decision of the learned District Judge in so far as it relates to issue No. 4 of the suit is set aside and the decision of the Subordinate Judge with regard to that issue is restored. The rest of the decision of the learned District Judge will stand.

Each party will bear its own costs in this appeal.

The cross-objection is not pressed and is dismissed.

Greaves, J.—I agree.

N. H. *Appeal allowed in part.*

(1) 39 Ind. Cas. 153; 44 I. A. 65 at p. 71; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 644; 19 Bom. L. R. 450; 44 C. 759 (P. C.).

(2) 44 Ind. Cas. 304; 22 C. W. N. 505 at p. 511, 23 M. L. T. 147; 7 L. W. 315; 27 C. L. J. 303; 34 M. L. J. 361; 4 P. L. W. 249; 16 A. L. J. 271; (1918) M W. N. 295; 20 Bom. L. R. 553 (P. C.).

(3) 24 Ind. Cae. 208; 22 C. L. J. 390.

(4) 48 Ind. Cas. 78; 28 C. L. J. 123.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 82 OF 1922.

April 22, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Mukerji.

FIRM SWARATH RAM-RAM SARAN —PLAINTIFFS—APPELLANTS

versus

Seth RAM BALLABH AND OTHERS— DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 65—Secondary evidence, when admissible—Specific performance—Minor—Contract entered into by guardian, whether can be enforced.

Secondary evidence of the contents of a document cannot be admitted until steps are taken to justify the admission of such evidence under s. 65 of the Evidence Act. [p. 28, col. 1.]

A guardian has no power to make a contract in the name of his ward so as to impose a personal liability upon the ward. [p. 30, col. 2.]

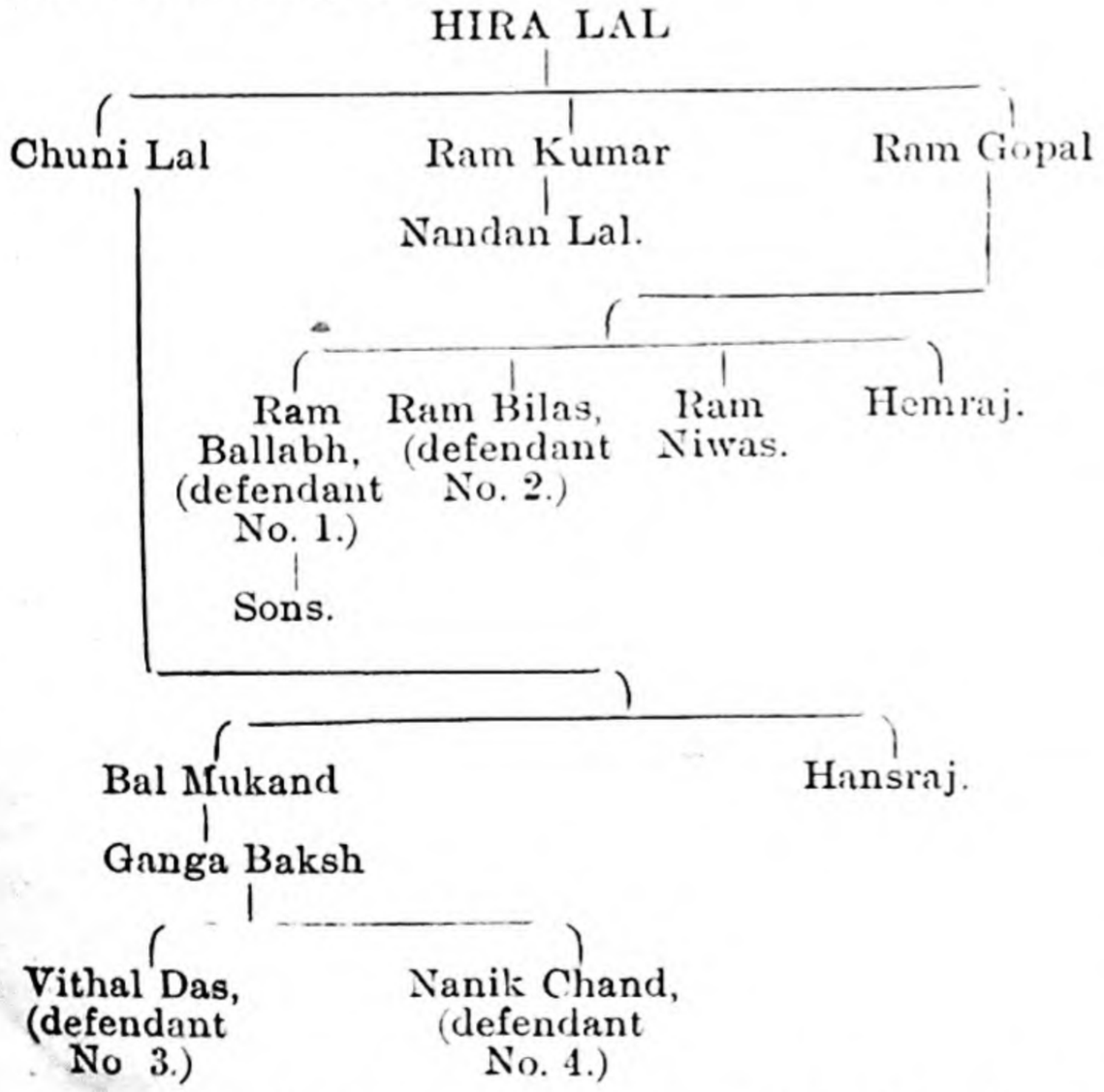
A decree cannot be passed against a minor or his estate on a contract entered into on his behalf by his guardian for his benefit. [p. 31, col. 1.]

First appeal from a decree of the Subordinate Judge, Agra, dated the 19th August 1921.

Mr. *B. E. O'Conor* and Dr. *K. N. Katju*, for the Appellants.

Sir *Tej Bahadur Sapru*, Dr *S. N. Sen*, Messrs. *B. Mallick*, *Gulzari Lal*, *G. Agarwala* and *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—The facts of this case will be better understood by a reference to the following pedigree:—



This is the appeal of the plaintiffs from a decision of the Subordinate Judge of Agra in a suit for specific performance The learned Subordinate Judge decided for reasons which we shall discuss that the plaintiffs were not entitled to the relief claimed by them. The plaintiff firm is known as Swarath Ram Ram Saran and Sital Prasad is one of the owners of that firm. For many years they had occupied as tenants a godown at Agra. The landlords were the defendants. The defendants in the year 1913 mortgaged this godown together with other properties to Nemi Chand for the sum of Rs. 90,000 carrying interest at the rate of 6 per cent. per annum. On the 11th of April 1914 it appears that the defendant firm sent a notice to the plaintiffs enhancing their rent from Rs. 400 to Rs. 750 a year. On the 13th of January 1917 there was a partition. The principal parties to that partition were the sons of Bal Mukand, Ram Kumar and Ram Gopal. The effect of the partition was that Nandan Lal, the son of Ram Kumar, was bought out and thereafter the son of Bal Mukand, Ganga Baksh and the sons of Ram Gopal each had a half share in the business which, we have been told, was that of commission agents, that is to say presumably at the end of each financial year the profits of the business would be equally divided between the sons of Ram Gopal and the son of Bal Mukand. In April 1917, and probably towards the end of that month, there was a conversation between Sital Prasad, Ram Ballabh and Nemi Chand as regards the purchase of the godown by the plaintiffs. There was some conversation as regards the price ranging round Rs. 11,300, but eventually on the suggestion of Nemi Chand, Sital Prasad expressed his willingness to give Rs. 12,000 for the property. Ram Ballabh seems to have acquiesced in this as being a reasonable offer and one which he himself would have accepted had the decision rested entirely with him and he stated that he would return to Sambhar and discuss it with the other people who were interested in the property. At this date there is reason to believe that Ganga Baksh was alive. He was undoubtedly dead on the 27th of May. According to the evidence no message came from Sambhar as to the offer and about the 15th of May Ratan Lal, the *munib* of the plaintiff firm went to Sambhar and had an interview with Ram Ballabh. The question whether he ever

went there has been disputed and it has been pointed out that in this firm one would except to find a record of his expenses, whereas it is admitted that no record exists. The answer is, according to the evidence, that Sital Prasad paid the sum of Rs. 10, 12 or 15 which was said to be the cost of the journey from Agra to Sambhar and back, out of his own pocket. We think he must have gone and on his return he said that there had been an agreement by all the interested parties. The next matter is one of importance. It is said that on the 20th of May Ram Ballabh wrote a letter to Nemi Chand addressed to Ajmere. At that date apparently Nemi Chand was in Agra. He was at all events in Agra on the 22nd of May and on the 22nd of May he sent for Sital Prasad who, with Ratan Lal, went to see him. He is stated to have shown the original letter of Ram Ballabh to Sital Prasad and Ratan Lal and Ratan Lal is said to have taken a copy. Before reading the letter we might just mention here that, in our opinion, the copy of the letter which was preferred to the Court and which was received in evidence ought not to have been received for the reason that the preliminary steps were not taken which would have made that document evidence. Nemi Chand having died the presumption would be that the letter was in the possession of Tikam Chand, his son and successor to the business, and a notice ought, undoubtedly, to have been sent to Tikam Chand to produce that document. If Tikam Chand had then said that it was not in his possession then, if it was likely that it was in the possession of anyone else, another notice should have been sent to that person. Indeed it was suggested that the letter had passed into the possession of a man named Ram Kumar who was said to be such a long way away from the Court at a place called Hoshangabad. No matter whether he was there or not the rules of the Court must be obeyed and before the Judge could have received this copy in evidence he ought to have been satisfied that the preliminary steps had been taken both as regards Tikam Chand and Ram Kumar to find out the whereabouts of that original document. However, the case proceeded and the Court accepted the letter and we also now accept it as a true copy of a document which did arrive at Agra on the 22nd of May 1917 and did come from Ram Ballabh. That letter shows that the writer expected that the *munib* of the plaintiffs was very likely to have come to Nemi Chand in respect of the sugar godown and the letter further says that the *munib* has also seen him. That does support Ratan Lal in his statement that he had in fact gone to Sambhar. "Please send for him and get earnest money in respect of Rs. 12,000 deposited. Please bring him round politely." Now that, undoubtedly, meant that Ram Ballabh did not want to lose a purchaser at Rs. 12,000 and he wanted Nemi Chand, who is a man of considerable social position at Agra, to deal carefully and prudently with the *munib* and arrange the contract. There is the sum of Rs. 12,000 mentioned and it had already been a matter of assent by Nemi Chand that if this money were paid he would reduce the principal sum under the mortgage to Rs. 78,000 with a corresponding reduction of interest and inasmuch as the defendants were receiving Rs. 400 only as rent and were paying Rs. 720 per annum as interest it was obviously to their interest to get this matter carried through without delay and it was good business to sell the godown. Sital Prasad says that he assented to the terms of this letter and that in fact he gave Nemi Chand a document in writing setting out all the particluars. Again, no step was taken by the plaintiffs to get that document and there is no evidence before this Court as to its contents. But we do know that on that day Nemi Chand mentioned Rs. 200 as the necessary earnest money and on that day the Rs. 200 was paid into the account of Nemi Chand. On the 27th of May 1917 the Firm of Seth Ram Ballabh executed a power-of-attorney to two people, one Tara Chand and the other Kewal Chand. On the 14th of July 1917 a stamp-vendor at Agra sold a Rs. 120 stamp to a man whose name he recorded as Kewal Chand, *munib* of Hira Lal Chunni Lal. It is said that Kewal Chand came down to Agra on this very business and was there round and about the 14th of July. It is further stated that a draft of the sale-deed was prepared by Ikram Husain that it was submitted to Kewal Chand, that the parties went to a Pleader named Baldeo Sahai. Basdeo Sahai thought it better to re-draft the whole agreement. Kewal Chand took that document away with him. At this interview with Basdeo Sahai, and possibly before the

the name of Hansraj was mentioned. He, it will be seen, is the son of Chunni Lal and Sital Prasad was anxious that Hansraj should be one of the executants of the sale-deed. Kewal Chand opposed it and said that it was not necessary because Hansraj had become bankrupt in Bombay some time before and had ceased to have any interest in the business. Sital Prasad was clearly not satisfied with this and instituted enquiries, and those enquiries, according to Ratan Lal took 1½ to two months and according to Sital Prasad five to six months before it was ascertained that Hansraj had been adjudicated bankrupt. Later we shall show that there is a curious circumstance in connection with this because we have not been able to discover on the record Ex. IV, mentioned in the evidence of Sital Prasad. The conclusive document which shows that Hansraj did become bankrupt is under the seal of the Bombay High Court. The date when the document was obtained from Bombay is the 30th of September 1918 and it evidences Hansraj's bankruptcy in 1914. On the 29th of July 1917 the defendants wrote a letter to the plaintiffs. It is a document which has given us cause for a certain amount of doubt as to whether Kewal Chand was in fact in Agra at the time when the stamp of Rs. 120 was purchased because the whole tone of the letter is that of a man who has never seen the text of any draft, who is anxious to get the matter through and who is prepared to send Kewal Chand after the receipt of it. But at all events whatever may be the real truth about it whether Kewal Chand came to Agra or not, this letter of the 29th of July 1917 asks the plaintiffs not to make a delay. From that date, *viz.*, the 29th of July 1917 there is an unbroken silence for a year. It is said that during that period the plaintiffs were verbally urging the defendants to complete, but the evidence is very slender on that and in any circumstance a plaintiff seeking specific performance must show a great deal more than verbal request week after week and month after month to complete. The plaintiffs must force the defendants either to complete or to repudiate. There is no real explanation of how it happened that the delay occurred, but it may very well be that Basdeo Sahai, at the interview when the name of Hansraj came up, pointed out to Sital Prasad that the mere fact of a bankruptcy of a member of the firm did not make that member walk out of the firm, but merely substituted his trustee in bankruptcy for him and that if in fact Hansraj had any property in this business that was of value, the trustee in Bankruptcy could come in and could claim it. That may have been one of the circumstances that disposed the plaintiffs to hesitate as to whether this contract was worth carrying through. On the 26th of August 1918 the defendants wrote a letter to the plaintiffs asking for an account relating to the godown which is rented by them. It is very curious that there is no reference whatever to be found in this letter to the fact that they had through the agency of Nemi Chand entered into a firm contract of the sale of the godown for Rs. 12,000 and the letter is the ordinary letter which one would expect from people who had stood to each other in the relationship of landlord and tenant. For the moment we pass over a very material date to mention that on the 5th of September 1918 an account was sent by the plaintiffs in which they included the sum of Rs. 200 which had been paid as earnest money and the further sum of Rs. 120 which had been spent in the purchase of the stamp paper. The explanation of that may possibly be that a *munib* was told to make out the account as it stood between the parties and he merely took a copy of the ledger exactly as it was and that there was in that ledger no separate rent account and no separate purchase account. An important date to which we have to refer is the 30th of August 1918. At page 93 of the record will be found a letter of the most definite repudiation. It shows that there had been a registered letter sent by the plaintiffs after the 12 months of unexplained silence. That registered letter, we are told, was a notice directed to the defendants to complete the contract. We think there is no doubt that by this time the plaintiff firm had come to know that the defendants second party on the record—Sarju Prasad and others—had begun the negotiation for the purchase of this godown. The letter of repudiation written on behalf of the firm by a Pleader says "I neither sold any house to you, nor took any earnest money." It makes a reference to the fact that the rent should be Rs. 750 and again asks for an account. Notwithstanding that most plain assertion by the defendants that there was no contract and never had

been one the plaintiffs wait ten more months before they commence the action and in fact send the account of September 5th. In the interval they send notices to various people who are connected with Sarju Prasad and others, the defendants second party telling them that they (the plaintiffs) have entered into a contract for purchase of the godown and warning them not to buy over their head. On the 23rd of March 1919 the defendants first party sold the godown to the defendants second party for the sum of Rs. 14,250. On the 14th of June 1919 this suit was instituted.

The first question that one has to consider is what was the effect of the death of Ganga Baksh at a time when beyond question the proceedings were in the negotiation stage only. From the time of the partition, which had taken place some four months before, the business presumably had been carried on jointly by Ram Ballabh and Ram Bilas on the one side and Ganga Bakhsh on the other. When Ganga Bakhsh died it did not seem to occur to any of these contracting parties that by operation of law the partnership had come to an end and that there would have to be a re-constitution of the partnership before any sale of this character could be carried through, nor apparently did it occur to the parties that *Musammat* Godaveri, the mother of Vithal Das and Nanik Chand who were boys of tender age, was the legal guardian of those minors. At its highest the case is that Ram Ballabh has been spoken of in this Court as the *de facto* manager of the business and *de facto* guardian of the minors. The fact is that there was in law no partnership business and Ram Ballabh had not behind him any record of past management of the business as it stood at and after the death of Ganga Bakhsh. There is no evidence given to us to show that there was any re-constitution of the business and no evidence given to show that *Musammat* Godaveri requested Ram Ballabh to look after the interest of the minors or that they had been incorporated into the firm. We are of opinion that in law Ram Ballabh had no authority to act on behalf of these minors. If, however, he had, then it appears to us that the plaintiffs are met by the difficulty which has been pointed out in *Waghela Rajsanji* v. *Sheikh Masludin* (1), *viz.*, that Ram Ballabh was purporting to bind the minors by a personal obligation. In this case the mother and guardian of a minor conveyed certain villages which were part of a *taluqdari* estate in liquidation of debts which were chargeable upon the estate and, stating that those villages were rent free, covenanted that if the villages should be assessed to Government revenue she, the guardian, and her minor son, the ward, would be liable to pay to the purchaser the amount of such Government Revenue. The liability was also charged upon other parts of the minor's estate. In fact later those villages were declared assessable to revenue and the question then arose as to whether the minor could be made liable to re-pay the amount which the purchaser of the village had been called upon to pay. The important passage is to be found at page 561* and their Lordships of the Privy Council stated that it was conceded that there was not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. They continue that they are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They stated that it would be a very improper thing to allow the guardian to make a covenant in the name of his ward so as to impose a personal liability upon the ward and they held that in this case the guardian exceeded her powers so far as she purported to bind her ward and that so far as the suit was founded on the personal liability of the *taluqdar*, it must fail. The emphasis there is laid upon personal liability and it is to be noted that in this suit for specific performance the personal liability of the minors is sought to be enforced against him. We have also had called to our notice the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed* (2) in which Lord Macnaghten in the Privy Council laid it down that neither the manager of a minor's estate nor the guardian of a minor is competent to bind the minor or the minor's estate by a contract for the purchase of immoveable property. The reason which their Lordships gave was that the minor not being bound by the contract there was no mutuality and even though the minor

(1) 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.).

(2) 13 Ind. Cas. 331; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 I. A. 1; 11 M. L. T. 8 (P. C.).

*Page of 11 B.—[*Ed.*]

in that case had reached his majority he could not obtain specific performance of a contract. Sir Tej Bahadur Sapru has put it in argument that the principle in that case is equally applicable whether a minor be a purchaser or a vendor of an immoveable property and that in either case the element of mutuality being wanting no suit for specific performance can be brought by or against the minor. We need not decide this point as we are satisfied that the case must fail on other grounds. Another case which has been brought to our notice is *Batchu Ramajogayya* v. *Vajjula Jagannadham* (3). In that case the learned Chief Justice gave a judgment which followed the case of *Waghela Rajsanji* v. *Sheikh Masludin* (1) to the full and held that a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit. Two other learned Judges who arrived at the same conclusion of law gave some rather different reasons for their decision. The case is a strong one because the minor had through his mother borrowed money for the purposes of defraying the expenses of the marriage of his sister. It was held that his mother as guardian could not enter into a contract on his behalf so as to impose any personal liability on him and in the peculiar tenure of the property it was held that the mortgage which had been given was invalid. The question, however, for the decision of the Madras Bench was solely the question of personal liability. In this connection the case of *Imambandi* v. *Sheikh Haji Mutsaddi* (4) might also be considered.

The result, therefore, is that first of all we hold that Ram Ballabh assumed an authority to deal with the minors' property which he did not possess in law. Even if he did possess it in law we hold that he could not by any engagement entered into by him put the minors under a personal obligation. There are other matters which, in our opinion, are fatal to this case and we have already mentioned the matter of Hansraj. Undoubtedly the question did arise as to whether Hansraj was to be a party to the conveyance or not. Sital Prasad never appears to have told Ram Ballabh that his objection to the omission of Hansraj's name from the document had been swept away. One had better see exactly what he did say. He said that "it was agreed" between him and Ram Ballabh that the name should not be inserted. That statement "it was agreed" is a conclusion of fact. It was not for a witness to draw a conclusion of fact, but it was for the witness to give evidence of facts from which the Judge would draw his own conclusion as to whether or not it was agreed. Sital Prasad never informed the Court when or where or in what manner he had communicated to Ram Ballabh the fact that he assented to the omission of Hansraj's name from the document. He says "I had a talk with Ram Ballabh about the name of Hansraj being mentioned on receiving the copy of application from Bombay." We have been quite unable to fix what that date is. If it is a reference to some period about 5 to 6 months after May it would be understandable, but it is not understandable if it is a reference to the 30th of September 1918 on which date he obtained a copy of the record of insolvency because it is inconceivable that Ram Ballabh then said "very well" as Sital Prasad represents him to have done, when one remembers that exactly a month before the defendants had written a letter of repudiation in the plainest terms. He says "When the draft was prepared I did not tell Kewal Chand in how many days I would make enquiry about Hansraj. I said only so much that I would enquire about Hansraj from Bombay. Had not the enquiry satisfied me I would not have obtained the sale-deed I did not also tell Kewal Chand that I would inform him after making an enquiry." The position, therefore, with regard to Hansraj is as we have said before that it was one important outstanding matter which was certainly outstanding for many months and one which Sital Prasad may never have subsequently discussed with Ram Ballabh or with Kewal Chand.

Then comes the final matter of delay. The first delay that is mentioned in the record is 5 to 6 months for obtaining information about Hansraj. Ratan Lal says $1\frac{1}{2}$ to 2 months. If in fact Sital Prasad took all that time to enquire, Sital Prasad was grossly negli-

(3) 49 Ind. Cas. 872; 45 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. I.. J. 29; (1919) M. W. N. 148.

(4) 47 Ind Cas. 513; 16 A L. J. 800; 35 M. L. J. 422; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; 45 C. 878; 45 I. A. 73; (1918) M. W. N. 91; 9 L. W. 518 (P. C.).

gent because an enquiry of that kind if made through a proper person would have resulted in an answer being obtained certainly within 21 days. The only thing which was wanted was the answer to one question—has one Hansraj been adjudicated bankrupt by the Bombay High Court? There was no need to wait for formal documents yet in that way according to Sital Prasad himself six months pass by. We have already pointed out that from the 29th of July 1917 to some time in August 1918 there is no sign of activity on the part of Sital Prasad. Lastly when on the 30th of August 1918 the defendants tell him in terms which admit of no possible doubt that they do not regard him in any sense as a purchaser of the godown, again Sital Prasad waits some ten months. We think those are circumstances coupled with the substantial difficulty about Hansraj which entitle us to assume that Sital Prasad had in fact abandoned all intention of going on with this contract, but was stimulated into activity by learning that the property was likely to be sold over his head. Thereafter he wrote the series of letters of which we have spoken in the hopes that Sarju Prasad would not continue negotiations and that having failed, brought the suit for specific performance. We agree with the learned Subordinate Judge that this is a case in which specific performance should not be granted and inasmuch as we have decided that Ram Ballabh had no authority to act on behalf of the infants, it follows that the whole suit must fail and we, therefore, dismiss this appeal.

In view of the fact that Ram Ballabh said untruthfully that the contract had to be carried through within 3 months and in view of the fact that he had also stated that Kewal Chand had ceased to be his *munib*, whereas in truth and in fact Kewal Chand was carrying though on their behalf a sale of Rs. 45,000 in value, on the 23rd of November 1918 and was acting obviously under the power-of-attorney of the 27th of May 1917, we deprive Ram Ballabh and the other defendants first party of their costs in this Court. Sarju Prasad will get his costs of this appeal from the plaintiffs including fees on the higher scale. The defendants second party Nos. 5 to 13 will get their costs from the plaintiffs including fees on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 35 OF 1922.

May 22, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice and Mr. Justice Macpherson.

DEBI PRASHAD DHANDHANIA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHESH LAL AND OTHERS—DEFENDANTS RESPONDENTS.

Receiver—Loan by Receiver for management of estate—Liability of Receiver—Liability of person for whose benefit loan was incurred.

The ordinary rule is that a Receiver put in charge of property for the purpose of managing it is personally responsible to any person with whom he may contract a liability for the purpose of managing the property, looking to be reimbursed from the estate itself. Where, however, money is borrowed by a Receiver pursuant to an express order from the Court and re-payment of the money is made a charge upon the assets only, the personal liability of the Receiver is excluded. [p. 34, cols. 1 & 2.]

A Receiver even if personally liable may create a liability upon the estate of the person for whose benefit the loan is taken. As the acts of the Receiver are the acts of the Court the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. [p. 34, col. 2.]

Appeal from a decision of the District Judge, Bhagalpur, dated the 2nd August 1921, confirming that of the Subordinate Judge, Bhagalpur, dated the 13th August 1920.

Messrs. *S. N. Pallit*, *Rai Guru Saran Prasad* and *Jadubans Sahay*, for the Appellants.

Messrs. *S. M. Mullick*, *A. K. Ray*, *S. N. Bose* and *Bindeswari Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted on the 19th September 1919, by Debi Prasad Dhandhania and other members of his family against a number of defendants, for the purpose of enforcing a bond dated the 5th July 1912, executed in favour of Debi Prasad Dhandhania by Sakhi Chand, to secure the re-payment of a loan of Rs. 2,000, carrying compound interest at the rate of 9 per cent. per annum. The money was borrowed by Sakhi Chand under circumstances somewhat peculiar and which I must refer to shortly in order to explain the nature of the questions which arise for decision in this case.

At the time when the loan was taken, litigation was pending between Sakhi

Chand deceased, who is represented in this suit by the defendants fourth party, and Darbari Lal who is now represented by the defendants first party. I may add that the other defendants in the suit, the second and third party defendants, are the *farzidar* of Darbari Lal and persons who are interested in the property which was the subject of the suit I am about to mention.

It appears that in the year 1897, a mortgage bond was executed by one Bulaki Lal in favour of Bishun Chand, the predecessor-in-interest of Sakhi Chand and the defendants fourth party. On the 23rd July 1909, Bishun Chand entered into an agreement with Darbari Lal to assign to him his interest under the mortgage-bond of 1897. On the 29th March 1910, Bishun Chand having died, a suit was instituted by Darbari Lal against Sakhi Chand, Bishun's brother and legal representative, for specific performance of the contract of the 23rd July 1909. Sakhi Chand was contending that no binding agreement had been entered into. The Trial Court, however, in that suit delivered its judgment on the 20th February 1911 in favour of Darbari Lal and ordered an assignment of the mortgage to be executed by Sakhi Chand in favour of Darbari Lal upon the latter depositing the agreed purchase price. The money was deposited in Court but was not taken out of Court by Sakhi Chand, for he entered an appeal to the High Court from the decision of the Subordinate Judge. Whilst that appeal was pending, an application was made to the Court by Sakhi Chand to appoint a Receiver of the mortgage interest in order that a suit might be brought upon the mortgage against the mortgagors, because at that time the suit was about to become time-barred and unless action was taken by either Sakhi Chand who claimed to be the real owner of the mortgage-bond or by Darbari Lal in whose favour a decree had been passed ordering a conveyance to be executed in his favour, then the bond would become time-barred and nobody would receive the benefit of it.

It appears quite clear from the evidence in the case which has been referred to in the judgments of the Subordinate Judge and of the District Judge, whose judgment is now under appeal, that Darbari Lal, as might well be expected, was not prepared to take part in bringing a suit against the mortgagor, for although he was assignee of the mortgage he had in fact in the year 1909 himself purchased from the mortgagor the equity of redemption in the mortgaged property. The result, therefore, would be, so far as he was concerned, that he would be a party, if he assented, to a suit brought against himself. His case was that he being a purchaser, of the equity of redemption and also the purchaser of the mortgage-bond, the whole property was his and there was no object in bringing a suit to enforce the mortgage. He was, however, at all times apparently perfectly willing to pay the price arranged for the assignment of the mortgage interest and in fact that money had been paid into Court.

On the 11th March 1912, the application of Sakhi Chand to appoint a Receiver was granted and he himself was appointed Receiver of the interest in the mortgage-bond in order that he might, on behalf of the person interested, bring a suit for its enforcement. In order to carry on the suit he applied to the High Court for power to raise a loan of Rs. 2,000 to provide funds to prosecute the suit Having obtained the leave of the Court, he accordingly borrowed the money from the plaintiff a banker of Bhagalpur, and instituted a suit on the 5th July 1912 as Receiver to enforce the mortgage-bond. At some time which has not been definitely stated but after the suit on the mortgage-bond was instituted, the appeal by Sakhi Chand against Darbari Lal in the suit brought to enforce specific performance of the contract of the 23rd July 1909, was decided in favour of Darbari Lal. Thereupon, as there was no further appeal from that decision, there was no object in Sakhi Chand as Receiver proceeding any further with the mortgage suit, and accordingly he made up his mind to make the best of matters and to take out of Court the money which had been deposited to his credit as consideration for the assignment of the mortgage-bond, and the suit which he had brought on that bond on the 5th July 1912 was dismissed on the 10th February 1914 without prejudice to the rights of Debi Prasad, the plaintiff in the present suit.

The question that now arises is whether the plaintiff is entitled to recover either from Darbari Lal or from any of the other defendants the amount borrowed under the bond in suit. Both the Subordinate Judge

and the District Judge on appeal considered that the plaintiff had no remedy against either of the defendants. The bond hypothecates the interest in the mortgage-bond of 1897 as security for re-payment of the loan, but even if a decree were passed in favour of the plaintiff upon the bond in suit as against the interest hypothecated, that would be a barren decree because the mortgage-bond of 1897 which was hypothecated has long since become time-barred and no suit could now be brought to enforce it.

There remains, however, the question of the personal liability of the defendants. In the bond in suit Sakhi Chand recites that he is a Receiver appointed by the High Court at Calcutta. He then refers to the making of the mortgage-bond of 1897 and to the litigation which was pending with regard to the agreement to assign that bond to Darbari Lal and states that in the capacity of Receiver he has borrowed Rs. 2,000 from Debi Prasad at 9 per cent. per annum interest agreeing to pay back the principal within a period of two years. Then it goes on to state that for security of the aforesaid amount borrowed with interest, "the amount due under the mortgage-bond, (that is the bond of 1912) will be an incumbrance over the aforesaid mortgage-bond dated 9th April 1897, that is to say from the amount realized under the aforesaid mortgage-bond dated 9th April 1897 the amount principal with interest and compound interest due under the aforesaid present mortgage-bond will be first paid up."

It will be seen that in addition to the charge upon the mortgage-bond itself, there is a personal covenant to re-pay the loan, and the question is, whether Sakhi Chand or Darbari Lal or any other of the defendants is liable upon that contract. Sakhi Chand entered into the contract as a Receiver, and it is contended that in the circumstances of this case he is under no personal liability as Receiver. The ordinary rule is that a Receiver put in charge of property for the purpose of managing it is ordinarily personally responsible to any persons with whom he may contract liabilities for the purposes of managing the property, looking to be reimbursed from the estate itself. There are, however, certain cases in which the principle does not operate so as to render the Receiver personally liable in respect of sums which have been advanced to him. Those cases are where the sums have been advanced pursuant to an express order from the Court and where re-payment has been made a charge upon the assets only. It was laid down by Mr. Justice Sale in the case of *Mohari Bibi* v. *Shyama Bibi* (1) that the Receiver even if personally liable may create a liability upon the estate of the person for whose benefit the loan was made. In that case Sale, J., after pointing out the difference between the position of trustees and Receivers in acting on behalf of an estate, says in his judgment: "In the latter case creditors deal with the Court through its Receiver, and the Court imposes obligations on the estate through the Receiver for protection of creditors dealing with the Receiver. It doubtless is the law, as appears from the case already cited, that in carrying on a business under directions of the Court a Receiver must necessarily incur personal obligations, but in incurring these personal obligations it seems to me that he necessarily and under the authority of the Court imposes obligations on the estate for the benefit of those creditors with whom he has dealt, and which obligations the Court ought and does give effect to and it is in this respect that a Receiver occupies a position towards an estate in his hands different from that of an executor or trustee." And in a latter part of the judgment he points out that the right to maintain such a suit is founded on the just and equitable principle that as the acts of the Receiver are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them.

It seems to me, therefore, that a Receiver appointed in the circumstances in which the Receiver in this case was appointed is entitled to, and does, in incurring obligations of this sort, create a liability upon the estate of the person for whose benefit the obligations were incurred.

What are the circumstances here? Sakhi Chand was suing to enforce a mortgage, a mortgage which in fact he had assigned to Darbari Lal. He was disputing that assignment; he had failed in the Trial Court and he had been ordered to execute a conveyance in favour of Darbari Lal. The purchase price had been deposited in

(1) 30 C. 937; 7 C. W. N. 799.

Court but he refused to take it out and he was bringing an appeal to the High Court from that decision. If he succeeded in that appeal then obviously he would be entitled to prosecute the mortgage suit and would probably recover more than the consideration for the assignment deposited in Court. Darbari Lal, on the other hand, was the proprietor of the equity of redemption and was contending that he was the assignee of the mortgage interest a matter still *sub judice*. It was, therefore, obviously not in his interest or for his benefit that any suit should be brought on the mortgage-bond. In the circumstances Sakhi Chand himself was appointed a Receiver of the interest in the mortgage-bond in order to prosecute the suit, and I may add, to prosecute the suit entirely for his own benefit. In these circumstances the appeal which he had taken to the High Court failed and, therefore, it was quite obvious after that, that he had ceased to have any interest in the mortgage-bond beyond the amount deposited and that the assignment to Darbari Lal was good and valid. Had he succeeded in his appeal against Darbari Lal and gone on with the suit on the mortgage-bond, he would presumably have recovered the amount due thereunder. It became, however, no longer practicable for him to prosecute the suit as Receiver of the mortgage interest for that had then passed to Darbari Lal who also held the equity of redemption. The result was that instead of getting into his hands the proceeds of the mortgage-suit which would have been charged with re-payment of the loan he was eventually content, and in fact bound, to accept instead the consideration for the assignment which had been paid into Court. It is true that that money was not the proceeds of the mortgage-suit and it is contended that it wes not charged with the re-payment of the loan under the bond now sued on, but in the circumstances, it represented Sakhi Chand's interest in the mortgage-bond which was the interest charged and I think he was bound to pay thereout the loan taken from the plaintiff. Moreover the money was borrowed entirely in his own interest to put him in a position to prosecute the mortgage-suit, and if that is so, it seems to me that his liability to re pay that sum undoubtedly arises as the person for whose benefit he borrowed the money, namely, himself. Assuming that he could not be sued as a Receiver because the transaction was made under the express directions of the Court, still I think, the principles of justice and equity require that he should re-pay that which he borrowed as Receiver and used for his own benefit and covenanted to re-pay, and that the defendants fourth party, as representatives of Sakhi Chand, the person for whose benefit the money was, in fact, borrowed, are liable to the extent of his assets coming into their hands.

The result will be that the decree of the District Judge will be set aside and a decree in lieu thereof will be entered in favour of the plaintiffs for the sum of Rs. 2,000 together with interest at the bond rate from the date of the bond up to the date of this decree and further interest at 6 per cent. per annum until realization.

The plaintiffs are entitled to their costs in this appeal and in both the lower Courts from the defendants fourth party. The appeal as against the other defendants in the suit will be dismissed. The defendants first and third party are entitled to one set of costs in each Court to be divided between them. The defendants second party did not appear and is not entitled to costs.

The decree of this Court will be subject to the provisions of ss. 52 and 53 of the C. P. C.

Macpherson, J.—I agree.

Z. K. *Decree set aside.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 154 OF 1922.

September 5, 1924.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

VADILAL RAGHAVJI—PLAINTIFF—APPELLANT

versus

MANECKLAL MANSUKHBHAI—AND ANOTHER—DEFENDANTS—RESPONDENTS.

Company—Suit by minority of share-holders—Fraud—Acts complained of approved by majority—Suit, whether can proceed—Procedure.

Where the minority of the share-holders of a Company bring a suit against the officers of the Company in which fraud is alleged against the defendants and the objection is taken that the suit cannot proceed, inasmuch as the majority of the share-holders have approved of or adopted the acts of the defendants which are complained of, the case should be allowed

to go to trial to ascertain the facts before it is finally determined whether the action of the majority could be questioned by the minority. For, in such a case until the facts are ascertained the Court cannot determine what is the precise action of the majority and whether it only amounts, on the one hand, to those matters of internal management, in which the majority of the share-holders quite rightly impose their will upon the minority or whether, on the other hand, it is one of those cases in which the assets of the Company are being improperly distributed by an attempt to pay them into the pockets of the majority of the share-holders of the Company or their friends at the expense of the minority. [p. 37, col. 2; p. 38, col. 1.]

Case-law referred to.

Per *Fawcett, J.*—In considering the question whether a person has a right to sue the Court has leaning in favour of that right unless it is plainly shown that the suit is barred. [p. 40, col. 1.]

First appeal against a decision of the First Class, Subordinate Judge, Ahmedabad.

Mr. *Coyajee* (with him Mr. *Soloman Moses*), for the Appellant.

Sir *Chimanlal Setalvad* and Mr. *B.J. Desai*, for the Respondents.

JUDGMENT.

Marten, J.—This is a first appeal from the judgment of Mr. K. J. Desai, First Class Subordinate Judge at Ahmedabad, dismissing the plaintiff's suit on the preliminary issues Nos. 1, 2, 4, 6, 7 and 8. In effect these preliminary issues are in the nature of what would have been in old days a demurrer to the plaintiff's case as pleaded in his plaint.

The suit is one brought by the plaintiff on behalf of himself and all other share-holders in the defendant Company except the 1st defendant and his nominees and those under his control. The 1st defendant is the manager and agent of the defendant Company, or as the phrase runs in India, one of its secretaries, treasurers and agents and his firm was so appointed in the Memorandum of Association itself as is unfortunately often done in this Presidency.

The charges brought against defendant No. 1 are based on fraud. Paragraph 5 of the plaint alleges that the 1st defendant's firm as agents of the Company have been guilty of frauds as thereinafter mentioned and they decline to allow the plaintiff to inspect the account books of the Company as they are afraid that such inspection will assist the plaintiff in exposing the frauds aforesaid. Paragraph 6 alleges that:—

"The 1st defendant's firm have taken advantage of the fiduciary position they occupy towards the Company and have obtained pecuniary advantage for themselves (1) by on diverse occasions wrongfully diverting the goods of the Company or to which the Company were entitled to their own use and advantage: (2) by appropriating to their own use large profits made in transactions entered into in the name of the Company in cotton, all of which transactions have been concealed from the Company and not entered in the account books of the Company."

Certain particulars are then given in the plaint and it is alleged that in addition to the particulars given there are other instances of fraud which would only be brought to light on a proper discovery. Then the prayer asks for an account of all profits and pecuniary advantages obtained by the 1st defendant by reason of his wrongful acts and for payment of the same, and an account of the profits he has made by the use of the Company's money and for the payment of the same.

The plaint further alleges that the defendant No. 1 himself holds 620 shares out of the 924 shares of the Company, and that with the shares held by his co-directors, who are his relations or nominees or friends, he can control in all some 647 shares, and that, as the minority of the share-holders hold only 277 shares; it is impossible for the suit to be brought in the name of the Company as the Board would not allow it, and accordingly the plaintiff is entitled to sue on behalf of himself and the other share-holders.

The plaint was filed on March 7, 1919. On April 1, 1919, an extraordinary meeting was held of the defendant Company at which in effect the plaintiff's suit was repudiated, and the Company affirmed the past mode of dealing between the 1st defendant and the Company, and also the course which defendant No. 1 had taken in regard to the matters complained of in the plaint. At that meeting the plaintiff was in a minority of one. Everybody there who was present in person or by proxy voted against him, so that quite apart from what I may call the interested votes of the 1st defendant and his co-directors, there was an independent majority against the plaintiff. It does, however, appear that some 13 share-holders holding in all 26 shares did not attend the meeting either in person or by proxy, but in any event their voting would not have affected the result actually arrived at.

Under these circumstances it has been held by the learned Trial Judge that the

plaintiff cannot maintain this suit inasmuch as the majority of the Company do not desire it to be brought. Further as regards the second branch of the complaint he held that the cotton transactions in question were *ultra vires* the Company and that consequently in no event could the Company claim the benefit of the transactions. He accordingly dismissed the plaintiff's suit.

I wish to emphasize that, for the purpose of testing whether this suit should be stopped at the outset, or whether it may proceed to trial, we can only take the plaint before us and must assume for the sake of argument that all the allegations in the plaint are proved. Nothing, therefore, that I may say in my judgment must be taken as in the least implying that these odious charges of fraud are in any way proved against the 1st defendant. On the contrary without in any way desiring to prejudice the trial of the action, it may be that, when the plaintiff's allegations come to be tested or if evidence is adduced by the defendant which establishes the accuracy and truth of what he has pleaded in his written statement, then the defendant may satisfactorily prove to the Trial Court that there is no fraud here whatever. But we are at present in this embarrassing position that we cannot go into the truth of the written statement, because naturally under the circumstances no evidence has been taken by the learned Judge. We are, therefore, really in the dark as to what are the true facts and can only act on the allegations in the plaint.

Now I have read the plaint more than once, but shortly stated it alleges something like an illegal abstraction of the assets of the Company by its fiduciary agent. The allegations might in certain ciruumstances amount to criminal breach of trust or to theft. And to test the question whether a majority can bind a minority under these circumstances, I put it to Sir Chimanlal Setalvad whether, supposing a case was one of actual theft and the fiduciary agent had actually stolen the assets of the Company, Counsel still contended that the majority of the share-holders could bind the minority not to recover those stolen assets of the Company. Counsel was forced to argue that the majority could bind the minority. It was then pointed out to him that a limited liability Company is strictly regulated by Statute and by the powers conferred by its Memorandum and Articles of Association. I was not surprised to find that Counsel was unable to cite any authority for the proposition that a majority of share-holders may allow the assets of the Company to be dissipated in thefts by its trusted agents. On general principles this proposition is clearly erroneous. The assets of a Company, so far as they represent profits, may be distributed by way of dividend. Capital assets may be distributed in a winding up or in certain other limited ways under the Indian Companies Act. But this present Memorandum of Association or rather the rough translation before us affords no ground for thinking that any such power as is here contended for is either expressly given or should properly be implied as incidental to that business which the Company is there authorised to carry on. There is not even any express power to lend money at all either to the agent or anybody else. Much less is there any power to let it be stolen. This objection to my mind goes practically to the root of the whole case, and is sufficient to dispose of it, for the difference between theft and the gross fraud pleaded here is an insufficient distinction in principle.

But it was strenuously argued before us that, even if you put aside this tainted majority of votes held by the 1st defendant still even then the overwhelming independent body of share-holders wanted this action to be stopped, and that accordingly it cannot proceed. It was further argued that all the cases in which a suit on the present lines has been allowed to proceed were cases in which what one may call the tainted votes were either the actual majority which passed the particular resolution or else were a deciding factor in turning the balance of the voting on the particular resolution. That appears to be so. But, on the other hand, no authority was cited to us in support of this other argument, *viz.*, that an independent majority is sufficient for the main proposition for which Sir Chimanlal was contending. I may, however, observe that in a case like this where fraud is alleged, and where consequently it is alleged that the suit is within one of the recognised exceptions to the principles laid down in *Foss* v. *Harbottle* (1), it will, I think, in general be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether the action of the majority can in fact

(1) (1843) 2 Hare 461; 62 R. R. 185; 67 E. R. 189.

bind the minority. This is because until the facts are ascertained with some distinctness, it is difficult to say what is the precise action of the majority, and whether it only amounts on the one hand to those matters of internal management where the majority of the share-holders can rightly impose their will upon the minority or whether on the other hand it is one of those cases in which the assets of the Company are being improperly distributed by an attempt to pay them into the pockets of the majority of share-holders of the Company or their friends at the expense of the minority.

In *Burland* v. *Earle* (2) Lord Davey sets out with his usual clearness the rules governing the present class of suits. I need not read the whole page. But, after stating the ordinary rule laid down in *Foss* v. *Harbottle* (1), he comes to the exceptions and says (page 93*):

"The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the Company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the Company, or in which the other share-holders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works* (3). It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the Company and the intention of the majority of the share-holders is clear. This may be illustrated by the judgment of Mellish, L. J.; in *Mac Daugall* v. *Gardiner* (4).

Then in *Cook* v. *Deeks* (5) their Lordships of the Privy Council say at page 564†:

"If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the Directors could not retain the benefit of it for themselves, then it belonged in equity to the Company and ought to have been dealt with as an asset of the Company. Even supposing it be not *ultra vires* of a Company to make a present to its Directors, it appears quite certain that Directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North West Transportation Co.* v. *Beatty* (6) and *Burland* v. *Earle* (2) have no application. In the same way, if Directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the Company, a resolution that the rights of the Company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of share-holders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Works* (3)."

Then we have the *North West Transportation Co.* v. *Beatty* (6). That was a case on the other side of the line where it was held that the Directors were not prevented from voting in a case where the proposed purchase of a steamer was a perfectly fair contract at a proper price. But even there the judgment says at page 600*:

"It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to show that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the Company itself."

That is an instance of another case which went to trial and where it was not even attempted to shut out the plaintiffs by proceedings in the nature of a demurrer.

Then in *Menier* v. *Hopper's Telegraph Works* (3) Lord Justice Mellish at page 354† says :

" I am of opinion that although it may be quite true that the share-holders of a Company may vote as they please, and for the purpose of their own interests, yet that the majority of share-holders cannot sell the assets of the Company and keep the

(2) (1902) A. C. 83; 71 L. J. P. C. 1; 50 W. R. 241; 85 L. T. 553; 18 T. L. R. 41; 9 Manson 17.
(3) (1874) 9 Ch. App. 350; 43 L. J. Ch. 330; 30 L. T. 209; 22 W. R 396.
(4) (1876) 1 Ch. D. 13; 45 L. J. Ch. 27; 33 L. T. 521; 24 W. R. 118.
(5) (1916) 1 A. C. 554; 85 L. J. P. C. 161; 114 L. T. 636.
(6) (1887) 12 A. C. 589; 50 L. J. P. C. 102; 57 L. T. 426; 36 W. R. 647.

*Page of (1902) A. C.—[*Ed.*]
†Page of (1916) A. C.—[*Ed.*]

*Page of (1877) 12 A. C.—[*Ed.*]
†Page of (1874) 9 Ch. App.—[*Ed.*]

consideration, but must allow the minority to have their share of any consideration which may come to them."

So, too, in *Alexander* v. *Automatic Telephone Co.* (7) Lord Lindley says (page 69*) :

"It is necessary, however, to consider the form of the action, and the relief which can be given. The breach of duty to the Company consists in depriving it of the use of the money which the Directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management which, according to *Foss* v. *Harbottle* (1) and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other share-holders. Under these circumtances an action by some shareholders on behalf of themselves and the others against the defendants is in accordance with the authorities, and is unobjectionable in form : see *Menier* v. *Hooper's Telegraph Works* (3). An action in this form is far preferable to an action in the name of the Company,and then a fight as to the right to use its name. But this last mode of procedure is the only other open to a minority of share holders in cases like the present."

In that case it was alleged that the Directors had used their powers under the articles of making calls on shares in such a way that they were not obliged to pay their calls at the same time as the other shareholders, and it was eventually held that they must account for the profits which they had thereby made.

Under these circumstances, it seems to me that at any rate as regards the first branch of this case, *viz.*, the improper diversion of the goods of the Company to the 1st defendant's private use the allegations must be investigated at the trial, and that at the present time we ought not to prevent this case from being heard. Similarly as regards the question as to the profits over the cotton contracts, we think that that matter must also go for trial and that the facts of the case must be ascertained.

In saying this I wish to be clearly understood that this does not mean that these so-called preliminary issues Nos. 1, 2, 4, 6, 7 and 8 are answered in favour of the plaintiff. It merely means that in our opinion no answer at the present stage ought to be given to the issues until the suit has been properly heard at the trial. In other words, they are not in the present case, having regard to the plaintiff's pleading, proper preliminary issues. And I wish again to say that in the absence of any evidence, it is quite impossible for us to go into the business matters raised in the written statement of the defendants and in particular to determine whether the alleged system of joint purchase was one which the majority of the share-holders could under certain circumstances, when proved, make binding on the minority.

Accordingly I would allow the appeal and set aside the judgment of the lower Court and remand the suit for a trial on all the issues raised. We made a suggestion to Counsel that when discovery is given here, a roving discovery through all the books of the defendant Company should not be allowed. We are quite alive to the defendants' allegation that this suit is brought from indirect motives having regard to the previous suit for breach of contract which the Company has brought against the present plaintiff. Those again are matters to be determined at the trial of the present suit. But in granting discovery it may be that the lower Court will think it prudent to limit discovery at any rate in the first instance to those matters and contracts which are expressly pleaded in the plaint, and not to allow a general roving discovery of all the Company's books in the hope that some other items may be discovered. If it should happen at trial that the particular charge of fraud were proved, then it may be that it would be open to the Court to order an enquiry in wide terms to elicit what profits in similar matters have been improperly obtained by the defendant. But in the present instance it seems to me without giving any binding decision on the point that the Court would be well advised to prevent any improper use being made of the present suit to enable confidential information as to the Company's business to be obtained by some one who may possibly be a trade rival or at any rate an enemy of this Company.

As regards the question of costs, we think the proper order to make is that the defendants should pay the plaintiff's cost of the appeal, and that the costs of all parties

(7) (1900) 2 Ch. 56; 69 L. J. Ch. 428; 48 W. R. 546; 82 L. T. 400; 16 T. L. R. 339.

*Page of (1900) 2 Ch.—[*Ed.*].

up to date in the lower Court be costs in the cause. The First Class Subordinate Judge will be directed to take up the case as soon as he possibly can. It has already lasted over five years.

Fawcett, J.—I concur. I fully appreciate the distinction which Sir Chimanlal Setalvad for defendant No. 1 has put before us that in the present case there was an independent majority against the plaintiff's suit. But I am not convinced that the English authorities do not favour the plaintiff's right of suit, inasmuch as the defendant No. 1 has a controlling voice in the voting on Resolutions at meetings of the Company and at the date the plaint was filed, the plaintiff was in a position to rely upon that fact as bringing the suit within the recognised exceptions to the rule laid down in *Foss* v. *Harbottle* (1) and other similar cases.

I think that in considering the question whether a person has a right to sue, the Court should lean in favour of that right, unless it is plainly shown that the suit is barred. And I agree with my learned brother that the present is a case where it cannot properly be held that the plaintiffs' suit does not lie at all. It is only after the main facts regarding the alleged frauds have been ascertained that it can be decided whether the resolution relied on by the Company bars the suit.

Note by Marten, J.—(September 20, 1924).—In the course of the arguments I referred Sir Chimanlal Setalvad to Suit No. 18 of 1909 in the Ahmedabad Court brought by Sakerlal Bulakhidas against Kevaldas Tribhovandas and the Bharatkhand Cotton Mills Company, Limited, and others. This was a suit by share-holder for a refund of moneys of the Company which had been mis-appropriated by its agent. There, as here, the majority of the share-holders of the Company passed resolutions against the suit and in favour of the agent. Both the Subordinate Judge and on appeal the District Judge held that these resolutions were *ultra vires* the Company and, therefore, inoperative as the Company had no power under its Memorandum of Association to lend money to its agent, and much less to allow him to appropriate the assets to his own use, and they referred to the judgment of Sir Norman Macleod in *In re Bombay Cotton Manufacturing Co., Ltd.* (8) in support of their decisions. An appeal to the High Court was dismissed, (see Second Appeal No. 388 of 1911), and accordingly the preliminary decree passed in the lower Court for an account stood. In its later stages the case again went to the High Court as First Appeal No. 99 of 1914, and subsequently to the Privy Council as Privy Council Appeal No. 21 of 1922 where the High Court decree for Rs. 1,46,453 against the agent was eventually confirmed. Sir Chimanlal sought to distinguish that case because according to him there was an express clause in the Memorandum of Association of the Company prohibiting any such loan: and that this clause was quite distinct from a resolution which the Company had passed in 1900 to prevent any such loan, but which was rescinded after the litigation began. This was quite contrary to my recollection of the case but as the papers were not before me, I made no reference to the case in my judgment. I have since seen the relevant papers, and find that Counsel was mistaken. The material documents will be found in the Privy Council Record, *viz.*, the Memorandum at page 104 and the first three judgments at pages 113, 131 and 147. In none of them is there any trace of any such express prohibition as Counsel stated. The case, therefore, is in point in the present suit, and is directly opposed to the propositions of law advanced by Counsel for the defendants.

(8) 4 Ind. Cas. 591; 11 Bom. L. R. 1302; 34 B. 533.

Z. K.

Appeal allowed;
Suit remanded for trial.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 231 OF 1923.

April 20, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

Acharya Guru Mahant RAM RUP GOSHAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mahant RAMDHARI BHAGAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit relating to trust—Ejectment of transferee of trust property, whether can be claimed—Transferee, whether can be made party to suit—Jurisdiction.

The words "granting such further or other relief as the nature of the case may require" in sub-clause (*h*) of s. 92 of the C. P. C., refer to reliefs *ejusdem generis* with the other reliefs specifically mentioned in the section and not to every possible relief which a Civil Court may grant. [p. 41, col. 2.]

In a suit framed under s. 92 of the C. P. C. a decree for actual possession against transferees from a trustee cannot be properly passed. There is, however, no objection to impleading the transferees of the trust property in such a suit or to declaring in that suit that the property in dispute is trust property, and armed with such a declaration the plaintiffs can bring a subsequent suit to eject the transferees from the trust property. [*ibid.*]

The jurisdiction given by s. 92 of the C. P. C. to the principal Civil Court of Original Jurisdiction is a special jurisdiction given for a particular purpose and where the purpose of the section would not be furthered by the inclusion of a particular relief in a suit, it would require strong grounds for holding that the relief is within the section. [p. 44, cols. 1 & 2.]

First appeal from an order of the District Judge, Ghazipur, dated the 30th October 1923.

Dr. *M. L. Agarawala*, for the Appellants.

Messrs. *U. S. Bajpai, K. Verma* and *A. P. Panday*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit which was brought professedly under s. 92 of the C. P. C. after the plaintiffs had obtained sanction of the Legal Remembrancer. The plaintiffs alleged that they had an interest in the properties in dispute which were dedicated properties that the deceased trustee as well as the present trustee had committed various breaches of trust and that the present trustee was liable to be removed. They impleaded a number of other defendants alleged to be transferees of the trust property. There were six reliefs claimed in the plaint (*a*) a declaration that the properties in dispute were *waqf* properties, (*b*) that the present trustee defendant No. 1 be removed and in his place a new trustee be appointed, (*c*) that the properties of Schedule 1 and 2 be vested in the new trustee, (*d*) that the transfers be declared to be null and void and the newly appointed *mahant* may be put in possession of the said properties, (*e*) a scheme be prepared for the up-keep of the *math* and its properties, and (*f*) any other relief that may be fit and proper.

The learned District Judge came to the conclusion that the suit so far as it was one for recovery of possession against the defendants second party was not properly brought under s. 92 of the C. P. C. He was of opinion that the proper *forum* in which to institute a suit to recover possession was the Court of the Subordinate Judge being the Court of the lowest grade having jurisdiction to try such suits. He accordingly thought that it would avoid a multiplicity of litigation in having the matter fought out in two Courts and he, therefore, thought fit to order that the plaint be returned for presentation to the Court of the Subordinate Judge. It is against this order that the present appeal has been filed.

It cannot be disputed for a moment that the order of the learned District Judge cannot be upheld in its entirety. Some of the reliefs claimed in the suit were reliefs which expressly and clearly came under s. 92 of the C. P. C. and, therefore, under sub-cl. (2) of that section were excluded from any regular suit brought not in conformity with the provision of that section. If the suit were filed in the Court of the Subordinate Judge that officer would have no jurisdiction to order the removal of the present trustee nor would he have any power to appoint a new trustee. He may also find it difficult to grant many of the other reliefs claimed in the suit.

It is obvious, therefore, that even if the learned Judge was right in holding that no relief for recovery of possession could be granted in a suit under s. 92 he was not justified in returning the plaint altogether. He might have called upon the plaintiffs to amend the plaint by striking off the relief which he considered could not be properly granted in the suit or he might have waited till he came to pronounce his judgment and might have dismissed the claim with regard to that particular relief. I, however, agree with the learned Judge that in a suit under s. 92 a decree for actual possession against transferees from the trustee cannot be properly passed and so the last portion of relief (*d*) cannot be granted. It may be that the language of sub-cl. (*h*) of the section is very wide, but it must be understood that the words "granting such further or other relief as the nature of the case may require" refer to reliefs *ejusdem generis* and not to every possible relief which a Civil Court may grant.

In a case of this Court—*Ghazaffar Husain Khan* v. *Yawar Husain* (1)—a Bench came to the conclusion that there was no objection to impleading transferees of the trust property in a suit under s. 539 of the old Code corresponding to s. 92 of the present Code, or to declaring in that suit that the property in dispute was trust property. Stanley, C. J., however, did not express any definite opinion as to whether a Court could direct the trustee to be put in possession of the properties in the hands of the trespassers. Burkitt, J., was clearly of opinion that such a relief could not be granted in a suit of that nature. He was of opinion that if the transferees surrendered possession of the property on demand by the new trustee, well and good, but if they refused, then the trustee could not recover possession otherwise than in execution of a decree for recovery of possession passed in a suit instituted by him before a Court competent to hear such suits. His opinion clearly was that no decree for actual possession could be granted by the District Judge under s. 539 of the old Code, but that armed with a declaration the trustee would be entitled to dispossess the trespasser in a subsequent regular suit. This opinion has found favour with other High Courts

(1) 23 A. 112; 2 A. L. J. 591; A. W. N. (1905) 208.

also. In *Budh Singh* v. *Niradbaran Roy* (2) the case in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3) was dissented from. The Bombay High Court has expressly held so in the case of the *Collector of Poona* v. *Bai Chanchalbai* (4). The Madras High Court has inclined the same way *vide Asam Raghavulu Setty* v. *Pellati Sitamma* (5).

The learned Advocate for the appellants has not been able to lay before us any case other than that in *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3) where a decree for actual possession against trespassers who are transferees from the trustee has been passed in a suit brought under s. 539 of the old Code or s. 92 of the new Code. The reason for not granting such a decree is that the wording of sub-cl. (*h*) can not be taken in its most general sense. It must be read with the preceding sub-clauses and the relief granted under it must be of a similar character. A relief for actual possession of trespassers is wholly outside the scope of s. 92.

But I have already said that this defect did not entitle the learned Judge to throw out the whole plaint and return it for presentation to another Court. No other matter has been considered or decided by the Judge nor has he yet considered the question as to whether a previous decision between the present trustee and some of the transferees operates as *res judicata*. I would, therefore, allow the appeal and remand the case.

Boys, J.—The circumstances in which this appeal comes before us have already been fully set out by my learned brother. The question for decision is whether the learned District Judge was right in returning the plaint or whether he could and should have tried the right of the plaintiffs to some or all of the reliefs claimed by them and if so which. There is no need to deal specifically with the relief (*a*) asking for a declaration that the properties specified be declared to be *waqf* properties. This relief is clearly within s. 92 of the C. P. C.—see *Ghazanffar Husain Khan* v. *Yawar Husain* (1). Similarly the reliefs (*b*), (*c*) and (*e*) for the removal of a *mahanth*, the appointment of a new *mahanth*, the vesting of the properties in the new *mahanth* and the preparation of a scheme are declaredly within s. 92 of the C. P. C. Relief (*d*) really contains two reliefs;

(*a*) that the transfers complained of be declared null and void and of no effect; and (*b*) a prayer for recovery of possession by delivery to the new trustee.

At the hearing a question was raised in connection with this issue as to whether the third party transferees could be impleaded in a suit under s. 92, C. P. C. It has been held that they can be so impleaded—see *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3) and *Ghazanffar Husain Khan* v. *Yawar Husain* (1) and I agree. It is clearly necessary for the purposes of an enquiry into the propriety of transfers by the trustee that the Court should have before it the transferees themselves.

To consider then the first portion of the relief (*d*) which prays for a declaration that the alienations made by the trustee whose removal is prayed for in relief (*b*) may be declared void. As the removal of a trustee is to be based on breach of trust clearly the acts of the trustee must be examined and if those acts prove to be the breaches of the trustee's duty clearly the Court must say so and this is equivalent to declaring the acts to be invalid and the alienations to be void—see also *(Ghazanffar Husain Khan* v. *Yawar Husain)* (1).

Before passing to consider the second portion of the relief (*d*) asking for delivery of possession to the new trustee, it may be noted that the plaint alleges certain acts of the predecessor of the existing trustee to have been breaches of trust. Such acts cannot themselves be regarded as breaches of trust by the present trustee—compare *Badri Das Mukim* v. *Chooni Lal Johurry* (6), but if the present trustee could have taken steps to save the property from the consequences of the breach of trust committed by his predecessor, his neglect to do so might in given circumstances constitute a breach of trust by him himself and naturally this would be still more so, if he continued to reap personally the benefit of his predecessor's breach of trust and the allegations should be enquired into.

I will now consider the prayer in the second portion of relief (*d*) asking as against the third party transferees for delivery of possession to the new trustee. It might

(2) 2 C. L. J. 431.
(3) 24 C. 418; 12 Ind. Dec. (N. S.) 946.
(4) 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690.
(5) 25 Ind. Cas. 794; 27 M. L. J. 266; 16 M. L. T. 178; 1914) M. W. N. 692.
(6) 33 C. 789 at p. 808; 10 C. W. N. 581.

seem at first sight that if, as already held, the alienations can in a suit under s. 92 be declared void, it is a natural corollary that a decree for recovery of possession should follow, but the two reliefs are not on the same footing. A declaration as to the legality of the alienation is within s. 92 because it is a necessary foundation for the finding that there has been a breach of trust and that declaration involves and is equivalent to a declaration that the alienation is void and such latter declaration is, therefore, within s. 92. But the recovery of possession by the new trustee is not necessary to complete the finding that there has been a breach of trust nor is it necessary for the purpose of any direction as to how the trust is to be administered.

The only cases directly opposite are *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3) and *Ghazanffar Husain Khan* v. *Yawar Husain* (1). In *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3). Banerji and Rampini, JJ., held at page 429* in a suit under s. 539 (corresponding generally to the present s. 92) that there can be a decree for the return of the property by the transferees. In *Ghazanffar Husain Khan* v. *Yawar Husain* (1) the decree appealed against was not a decree for delivery of possession, but only directed the trustee "to bring into his possession" the property improperly alienated (page 116†). Both Stanley C. J., and Burkitt, J., held that this latter direction was a valid direction. The question whether there could be a decree for actual delivery of possession, therefore, did not actually arise, and any *dicta* in regard to the possibility of such a decree were, therefore, *obiter*. Both Judges, hower, discussed the question, Burkitt, J., held (1) that a decree that the new trustee should "bring into his possession" the property improperly alienated was within the power of a District Judge in a suit under s. 539 (now s. 92), but it did not amount to a decree "for recovery of possession" and could not be executed as such; that if the transferees surrendered possession, well and good; but that, if they refused to surrender, the new trustee must bring a separate suit in the competent Civil Court and get a decree for recovery, (2) that a District Judge could not in suit under s. 539 (now s. 92) pass a decree for recovery of possession against third party transferees; unless, of course, a suit to obtain such a decree had been instituted in the ordinary competent Civil Court and he had called it up for trial before himself; in which case it would not of course be a suit under s. 539 at all. He did not refer to *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3), in which Banerji and Rampini, JJ., held that such a decree for recovery of possession against the transferees was within s. 539, but the case had been quoted in argument. Stanley. C. J., held that it was clear that the Court may in a suit under s. 539 direct a trustee who is being removed to make over the trust property to the new trustee. As to whether it could direct a transferee of property held to have been improperly alienated to make over the property to the new trustee, he said that he would have had difficulty in following Burkitt, J., in the difficulties which the latter found in the way of accepting *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3), but he did not consider it necessary to decide the point.

These two cases are so far as appears to me, the only cases which appear to be directly apposite to the one before us. We have, therefore, a decision of two Judges of the Calcutta High Court that such a decree is within s. 539 (now s. 92); the *obiter dictum* of one Judge, Burkitt, J., of a Bench of this High Court that such a decree is not within s. 92 and the *obiter dictum* of the other Judge, Stanley, C. J., of the Bench that if he had to decide the point he could not accept the arguments which had influenced his brother Judge. The question arises directly in the present case before us. Section 92 by its terms applies only where there has been an alleged breach of trust or where a direction of the Court is necessary for the administration of the trust, and if either of those conditions is satisfied, and, in addition the proper consent has been obtained to the institution of the suit, the section then proceeds to declare (*a*) to (*h*) what decree may be passed.

The object of the section has been declared to be [*vide Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (3)], and this interpretation has not so far as I am aware ever been qualified or challenged, "to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in

*Page of 24 C. —[*Ed.*]
†Page of 28 A.—[*Ed.*]

the trust". This object is in no way furthered by holding that in a suit by a person interested for the removal of a trustee and the appointment of a new trustee a relief may be added *against a third party transferee* that he be ordered to deliver up possession.

Again, a consideration of the matters set out in cls. (*a*) to (*h*) in s. 92 strongly suggests that those clauses are only concerned with either (1) the direct consequences of the breach of trust which is one of the alternative conditions precedent to the applicability of s. 92 *e. g.*, cls. (*a*), (*b*), (*c*) and (*d*) or (2) directions for the administration of the trust which is the other of the alternative conditions precedent to the applicability of s. 92 *e. g.*, cls. (*c*) to (*g*).

To neither of these purposes is a decree for recovery from a third party of property improperly alienated in any real sense akin. A decree for delivery of possession by the trustee who has been removed to the new trustee may be held to be within s. 92 as being a necessary consequence of his removal for breach of trust but that is not the case before us and is on quite a different footing from the case of the third party transferee.

It is urged that cl. (*h*) is wide enough to include a decree against a third party transferee for delivery of possession. It is admitted, and it has been more than once pointed out [*vide Jamal-ud-din* v. *Mujtaba Hussain* (7), *Ghazanffar Husain Khan* v. *Yawar Husain* (1) and *Budree Das Mokin* v. *Chuni Lal Jhorry* (6)] that to cl. (*h*) must be applied the ordinary test generally applicable to such clauses, that it can only be applied to matters *ejusdem generis* with the preceding matters; but, admitting this, it is further urged that a decree for recovery of possession is *ejusdem generis* with the power given by cl. (*c*) to vest any property in a trustee. That clause is clearly only intended to cover such cases as where a new trustee is appointed.

There is nothing else in cls. (*a*) to (*g*) which can remotely suggest that the relief which we are considering can be included in cl. (*h*).

The passing of a decree for possession is properly the duty of the ordinary Court possessing jurisdiction in the particular case. The jurisdiction given by s. 92 to the principal Civil Court of Original Jurisdiction is a special jurisdiction given for a particular purpose and where the purpose of the section would not be furthered by the inclusion of the relief in the section, it would require strong grounds to justify holding that the relief is within the section. Such grounds do not appear. I concur, therefore, in the order proposed by my learned brother.

By the Court.—We accordingly allow this appeal and setting aside the order of the learned District Judge remand the case to his Court in order that it may be restored on its pending file and disposed of according to law. The costs in the Court below and in this Court will abide the event. The costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

7) 25 A. 631 at p. 635; A. W. N. (1903) 120.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 562 OF 1922.

November 4, 1924.

Present :—Mr. Baker, J. C., and Mr. Kinkhede, A. J. C.

WASUDEO—PLAINTIFF—APPELLANT

versus

BHIWA—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), ss. 35, 36—Hindu Law—Surrender by tenant—Application by female heir to set aside surrender—Female heir placed in possession, whether entitled absolutely to holding—Succession, rule applicable to.

Where an occupancy tenant surrenders his holding to a landlord under s. 35 of the C. P. Tenancy Act and the surrender is set aside, upon an application made under s. 36 of the Act, by the heir of the tenant who happens to be a female, and the female heir is placed in possession of the holding upon her undertaking and paying the statutory liabilities out of her own separate funds, the holding does not belong to her absolutely so as to make her a fresh stock of descent. She takes only a widow's interest in the holding as if the tenant were dead and she inherits the whole of it for want of nearer heirs at the date of the surrender. [p. 51, col. 1.]

Premlal v. *Bhagchand*, 69 Ind. Cas. 669; 19 N. L. R. 4; (1923) A. I. R. (N.) 34, overruled.

Case-law discussed.

Appeal against a decree of the District Judge, Wardha, dated the 14th August 1922, confirming that of the Third Subordinate Judge, Wardha, dated the 29th of April 1922.

Messrs. *D. N. Khare*, R. B. and *G. N. Kawley*, for the Appellant.

Mr. *D. T. Mangalmoori*, for the Respondent.

ORDER OF REFERENCE.

Kinkhede, A. J. C.—After going through the record I think the question of law involved in the case is of such importance that it is desirable to have an authoritative decision by a Bench.

The question to be referred to a Bench is as follows :--

Where an occupancy tenant surrenders his holding to a landlord under s. 35 of the Central Provinces Tenancy Act and the surrender is set aside upon an application made under s. 36 of the said Act by his heir who happens to be a female, and the female heir is placed in possession of the holding upon her undertaking and paying the statutory liabilities out of her own separate funds, does the holding belong to her absolutely so as to make her a fresh stock of descent, or does she take only the widow's interest in the same as if the tenant were dead and she inherited it for want of nearer heirs at the date of the surrender.

Kotwal, A. J. C., has held in *Premlal* v. *Bhagchand* (1), that she takes the land as a new tenancy and becomes a fresh stock of descent so as to let in her own personal heirs. Mr. Mittra, A. J. C., held in *Sumarandas* v. *Thakur* (2) that the person to succeed to a tenancy after a female is the heir of the last male-holder and not the heir of such a female. This view is supported by and is in accordance with the view that has prevailed in this Court since a very long time. *Per* Stevens, J. C., in *Fakira* v. *Hari* (3), *Salita* v. *Sitaram* (4), and *per* Ismay, J. C., in *Sheoshankerpuri* v. *Rukhma* (5), and *per* Drake-Brockman, J. C., in *Vithu* v. *Mendri* (6), and does not go against the view taken by Hallifax, A. J. C., in an analogous case under s. 45 of the Central Provinces Tenancy Act, in *Sheoram* v. *Tikaram* (7).

As at present inclined my own view is that the person placed in possession gets the tenant-right in virtue of his or her possession as heir to the surrendering tenant and not independently of it, and, therefore, the interest of the female heir so placed in possession must be only such interest as she may have under the personal law to which she is subject in property inherited from her husband. Here the mother being a female heir under Hindu Law had only a widow's interest and could not be a fresh stock of descent so as to let in her own personal heirs. I would, therefore, request that if the Judicial Commissioner thinks that this is a fit case for reference to a Bench it may be so referred and the Bench may be constituted.

Baker, J. C.—To be heard by a Bench.

(1) 69 Ind. Cas. 669; 19 N. L. R. 4; (1923) A. I. R. (N.) 34.
(2) F. A. No. 36 of 1914, dated 9-10-16.
(3) 6 C. P. L. R. 135.
(4) 6 C. P. L. R. 138.
(5) 15 C. P. L. R. 89.
(6) 4 Ind. Cas. 792; 5 N. L. R. 172.
(7) 71 Ind. Cas. 129; 19 N. L. R. 26; (1923) A. I. R. (N.) 93.

OPINIONS.

Kinkhede, A. J. C.—The facts of the case appearing from the judgment are as follows :—

The fields in suit were originally held by one Govinda in occupancy right. On his death, his son Dewaji inherited them. Dewaji died leaving behind a mother, Bahena, and a widow. *Musammat* Soni, although the latter inherited the holding, she surrendered it to the landlord with the express object of divesting herself of the tenant-right and of, what she considered, becoming free to remarry. Soon after this she remarried. Dewaji's mother, Bahena then applied to Revenue Officer to be placed in possession of the holding under s. 36 of the Central Provinces Tenancy Act and was placed in possession on payment of Rs. 28, the amount of rent which Soni had left in arrears. *Musammat* Bahena remained in possession of the land till her death. After Behana, her lessees were sued by one Bhiwa, who claimed to inherit the holding from Dewaji as his cousin and heir. During the pendency of this suit one Wasudeo, the son of Behana's predeceased daughter Sita, brought the suit, out of which this second appeal has arisen, against Bhiwa and the lessees of Bahena. The basis of his claim was that by payment of Rs. 28 out of her separate funds for arrears of rent and also by the conferral of tenancy right upon her by the Revenue Officer, Behana, became the absolute owner of the holding and as such she became a fresh stock of descent in respect of the holding which was *stridhan* in her hands. This contention failed before the Trial Judge as also before the District Judge. The

plaintiff has, therefore, come up in second appeal and urges, relying on a decision of this Court in *Premlal* v. *Bhagchand* (1) that his appel must succeed. The appeal was heard by a Bench of two Judges by order of the Judicial Commissioner.

The provisons relating to surrender by tenants are contained in ss. 33 and 34 of the old Tenancy Act of 1883, and s. 35 of the new Tenancy Act, 1898. As tenancy originates in a contract and is supplemented and controlled by Statute, it logically follows it must ordinarily be determined by a contract with the landlord and also lapse to the landlord where the last tenant dies without any lawful heir entitled to succeed under the tenancy law; because, it is in him that the ultimate revision vests. It will, however, be remembered that where such ultimate reversionary interest of the landlord is subject to the prior reversion in favour of the heirs recognized by the tenancy law, the law will look askance or with disfavour at any transaction between the tenant for the time being and the landlord which in any way brings the latter's reversion into being earlier, *i. e.*, during the tifetime of heirs, and thereby derogates from the grant and its statutory incident of heritability, and thus seeks to defeat the right of succession to which it has given its recognition. Therefore, if the holder of tenant-right tries to bring his lease-hold interest or tenant-right to premature end by executing a surrender in favour of the landlord the *bona fides* of the trasaction was liable to be challenged in a civil suit.

It will thus be seen that, where the holder of the tenant-right is a male, he can represent the tenancy fully, in its relation to the landlord, and, if he executes the surrender, and if he is, under his personal law, competent to act for himself, he acting with the landlord in whom the immediate reversion in his case vests, can, by a consensus of mind put an end to the tenancy by surrender under an express contract permitted by s. 33, or forfeit it by implied surrender as contemplated by s. 34 of the Act of 1883, or extinguish it under s. 35 of the new Act of 1898. But where such right is held by a widow or other female heiress whose interest is analogous to that of a Hindu widow although for certain purposes she represents the tenant-right in its relation to the landlord, her rights are not equal to those of a male. The very nature and incident of the devolution of the tenant-right in her favour carries with it certain disabilities which the law recognises in the interest of the next reversion. The tenant-right must in such a case be deemed to be spilt up, as it were, in the eye of law by the very fact that the tenancy has devolved on the female in such a way that there cannot be a complete merger of the tenant-right if she were to release it by her own voluntary act or by her failure to perform the duties of a tenant for the time being in favour of the landlord in whom ordinarily the immediate reversion vests, unless the reversionary heir's interest with which the widow's *qualified estate* is "*saddled*" in cases governed by Hindu Law, has also fallen in along with such "*qualified estate*" by means of a transaction in which the widow and the reversioner have acted together, or by the latter's giving his consent to the widow's submerging the lesser interest, namely, the entire tenant-right, in the greater right of the landlord, so as to bring about a complete merger, and wipe the tenant-right altogether out of existence. In my opinion it could not be open to her to arrogate to herself all the powers and privileges of a male tenant, for the simple reason that being a female heiress she takes the inheritance with full liberty of enjoymeut of the usufruct, but subject to restrictions imposed both as regards the devolution of the corpus on her husband's heirs, and her power of disposition over it, during her lifetime, under Hindu Law, in addition to the restrictions that exist on the right of succession and transfer to which she is subject, under the tenancy law like the other tenants of her class. The tenant-right and the immediate reversion which vest in the case of a male tenant respectively in the tenant, and in the landlord, for the time being, cannot thus be considered to be vested only in a Hindu famale and the landlord respectively, as such a construction would altogether ignore the interest of the reversionary heir.

It has long been the settled law that to make a surrender by a Hindu widow effectual, all interest in and possession of life-interest must be abandoned by her: *Behari Lal* v. *Madho Lal* (8), that is to say she

(8) 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. s) 603 (P. C.).

can, so to speak, by a voluntary act bring about her own death. It is the self-effacement of the widow—an effacement which in other circumstances is effected by actual death or civil death, which opens the estate of the deceased husband to the next heirs at that date.

The reversioner's interest must, therefore, begin to operate and fasten itself on the estate held by the woman the moment she is divested of her widow's estate either by natural death, or by civil death, as in the case of re-marriage, or by a *bona fide* self-effacement as in the case of a total renunciation of the widow's whole interest in the whole of the estate in favour of the nearest reversioner or whole body of next reversioners, *i.e.*, her husband's next heirs ; *Rangasami Gounden* v. *Nachiappa Gounden* (9) and *Bhagwat Koer* v. *Dhanukdari Prashad Singh* (10). The transferee from her takes *her* interest subject to the rights of the heirs and of the landlord to avoid the transactions on grounds open to each of them. She cannot claim to be a representative of the entire estate where her act, instead of being for the preservation or benefit of the estate, aims at its destruction or annihilation. Thus she neither singly nor in conjunction with strangers or persons other than those in whom the reversion vests and who are entitled to object to her dealing with the tenant-right under the Hindu Law, or even the tenancy law, including the landlord, can prejudice the rights of those to whom the right of succession or reversion is secured by Statute.

I do not see any difference in principle between the case of a transfer by a Hindu widow to strangers and surrender by her in favour of the landlord where the estate of a reversionary heir intervenes. Though in form it purports to be a surrender of the whole tenant-right the a reversionery interest must ordinarily remain untouched by it unless it is a *bona fide* surrender. The so-called surrenderee becomes, as it were, only a transferee in the eye of law, as was the case when a landlord took a surrender of tenant-right after the tenant had created a valid usfructuary mortgage, and it was allowed to operate merely as a transfer of the equity of redemption only to the landlord: *Baliram* v. *Ram Rao Mahratta* (11). Unless, therefore, it is shown that the reversioner has, by taking some benefit, or by consenting or doing any other act, relinquished his interest in favour of the landlord, or signified his assent to the widow's act of submerging the lesser interest of the tenant, in its entirety, in the landlord's greater interest, the fusion of the two estates, which is absolutely necessary to give the landlord a complete mastery over the tenant-right, does not take place. He cannot in the case of a Hindu female acting in collusion with him and with the avowed object of prejudicing the right of the reversioner deprive him of his right to challenge the *bona fides*, and the binding character of the transaction as against him. The two estates must be completely united in one person and must be fully represented for the purposes of such union by those in whom they vest in the eye of law, and by whom they are held for the time being, and this is why there cannot be a surrender of a part or undefined and undemarcated portion of the holding, or by the individual act of a person who is only a joint tenant along with another, or in favour of a person who is not the sole landlord but a co-sharer in the village. None of these transactions operates to drown the lesser interest into the greater because there cannot legally be or is not a complete confluence of two interests.

It is on this principle, as I understand it, that the theory of surrender of tenant-right in the Central Provinces is based. The Courts have constantly refused to recognize the validity of voluntary surrenders where they operated to prejudice a prior valid grant. This Court has consistantly held that the tenancy has in the eye of law a continuance for the purpose of working out rights already created under a prior valid grant lawfully grafted as it were on the tenant-right: *Bhuray Brahmin* v. *Lala Vishwanath* (12). Of course, where the tenant-right itself comes to an end by operation of law and not by the voluntary act of the tenant throwing up the tenancy the case is treated differently.

Hindu Law does not allow a Hindu widow to prejudice the reversionary heirs' rights ; I say it was never the policy of the tenancy

(9) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P. C.).

(10) 53 Ind. Cas. 347; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.).

(11) 4 N. L. R. 57.

(12) 3 N. L. R. 170.

law also to allow them to be prejudiced at the hands of a Hindu female whose interest is analogous to that of a Hindu widow in inherited property. It is necessary to point out here that the true import of Drake-Brockman, J. C.'s observations in *Vithu* v. *Mendri* (6), beginning with. "This view.....to the level contended for" often quoted to support the unqualified right of a Hindu female to surrender an occupancy holding, is rather the other way, because he was there refuting the argument that a Hindu widow takes as full heir and can make an absolute disposition of tenancy, as his remarks to the effect "the Legislature would have used very clear and unmistakable language had it intended to *raise the interest* of a Hindu woman in an inherited holding to the level now contended for" would show.

No doubt he observes in *Dajiba* v. *Raghunath* (13), that s. 35 (*i*) of the Central Provinces Tenancy Act, is so generally worded as to preclude the reversioner from questioning the Hindu widow's surrender because it gives power to surrender "the holding" and not merely the right of the tenant for the time being in his holding, still, it appears, he realized the difficulty himself, as his following observations at page 128* clearly show:—

"The special provision in s. 36 is certainly difficult to account for, limited as it is to occupancy holdings; but I think its principal object must have been to defeat an ex-proprietary tenant of *sir* who endeavours to circumvent s. 45 (1) giving him occupancy rights. Upon the view put forward for the appellant a landlord might have to deal with a reversioner's claim as much as a century after the death of the tenant from whom descent should be traced: take for instance the case of a tenant who leaves a girl widow and an infant daughter, the women succeeding one after the other and the daughter surrendering at the very close of a long life."

With due respect to the above remarks, I say that s. 36 contemplated avoidance of every surrender unless the landlord was in a position to prove that any particular surrender was "*bona fide*" and had "not been made with the object of evading the provisions of s. 45 or s. 46" as is clearly pointed out in sub-s. (4) of that section. In face of the express mention of "s. 46" in the sub-section, it is not, I respectfully submit, correct to say that the principal object of s. 36 must have been to defeat an exproprietary tenant of *sir* who endeavours to circumvent s. 45 (1) giving him occupancy rights. The anomaly relied upon as suggesting the opposite conclusion, namely, that of a surrender by a Hindu widow being treated as operating against the "holding" and not against the "right of the tenant" for the time being in his holding, or of a reversioner's claim being put forward a century after the surrender, disappears if the female surrendering tenant is regarded as having thereby become, either a total stranger to the family or brought about her own complete self-effacement or civil death as it were side by side with the annihilation of her interest in the tenancy. If she murders the tenant-right she must also be regarded as having committed her own suicide so far as her tenancy is concerned, because her continued existence for the discharge of her duties in respect of the tenancy is necessary for its continuance. With the help of this fiction of death the rights of heirs of her husband can be worked out very easily. Drake-Brockman, J. C., has himself recognized this fiction of death in his decision in *Rao Vinayak* v. *Laxman* (14), in connection with a relinquishment executed by a co-parcener in a Mitakshara joint family in favour of another individual co-parcener, and determined the shares of the rest of the co parcenary as though the relinquishing co-parcener was dead. He had the support of an eminent Judge like Sir Lawrence Jenkins, C. J., of the Bombay High Court in *Wasantrao* v. *Anandrao* (15). Drake-Brockman, J. C.'s. reference at page 61* to that Bombay case is very important:

"It was held in appeal by Jenkins, C. J., and Batchelor, J., that the release should be treated not as for the benefit of Kashinath alone but for that of the whole coparcenary, the shares on partition being determined as though Madhavrao was dead. The decision as a whole was confirmed by their Lordships of the Privy Council who remarked that the principles governing the case had been rightly applied in the appellate judgment: it was also expressly stated that the release did not operate to deprive Madhavrao's son of his right as a coparcener."

(13) 20 Ind. Cas. 920; 9 N. L. R. 126 at p. 127.

*Page of 9 N. L. R.—[*Ed.*]

(14) 44 Ind. Cas. 51; 14 N. L. R. 56 at p. 61.

(15) 6 Bom. L. R. 925 at p. 947.

*Page of 14 N. L. R.—[*Ed.*].

While rocognizing that the surrender or release operates in such cases to put an end to the death of the surrenderer, he expressly ruled that it leaves unaffected the interest of those whose interests are not duly represented in the transaction or who do not derive any benefit therefrom. The principle that a murderer of a person should himself be treated as dead for the purposes of succession to the person murdered, has been affirmed by the Privy Council only recently in *Kenchava* v. *Girimallappa* (16). I, therefore, hold that the surrendering widow can very well be regarded as dead on the date of the surrender so to let in the next reversioner at once.

It was to this principle recognized by law that the Legislature when enacting the Tenancy Law of 1898, gave prominent sanction by enacting the provisions of s. 36. But even though the Legislature extended their protection to *bona fide* surrenders, as sub-s. (4) of the section will show, it was only in respect of surrenders which appeared to the Revenue Officer to be in evasion of the provisions of ss. 45 and 46 (1) that they were given power to grant relief to the heirs. This clearly shows that it was not a new right created by the Tenancy Act but a recognition of the pre-existing right of an heir to get back the tenancy, if it were attempted to be got rid of by a tenant in contravention of those sections, provided the heirs applied within the period of two years. If I may say so, it made the position of male tenants as also that of female heirs under Hindu Law practically alike in the sense that the surrenders by both, if they were in contravention of the Tenancy Law, were bound to be treated as transfers and were not to be allowed to operate so as to divert the tenancy into the hands of strangers or even to efface the tenant-right out of existence to the prejudice of the heirs to whom their succession was vouchsafed by law. The Legislature had, therefore, to provide a summary, speedy and less costly procedure to give effect to this policy in preference to the usual costly remedy of a civil suit. This necessitated the conferral of exclusive jurisdiction on a special *forum* and also the consequential barring of a remedy in a Civil Court. By providing a special procedure and special *forum* the Legislature did not intend to create a new tenant-right, different in kind and inconsistent in tenure, from that held by the outgoing tenant, or independent of the one relinquished through the medium of the surrender. The self-same right was allowed to be claimed by the heirs of the outgoing tenant and the right to apply to be placed in possession of the holding was recognized as accruing to the heirs in the same manner and to the same extent and in the same order as the may have inherited, if the surrendering tenant had died without nearer heirs at the date of the surrender. In other words the underlying principle of s. 36 was to revive the tenant-right for the benefit of the heirs at law, and not to make them new tenants. Of course, limitations had to be put upon the exercise of such right in the best interests of the tenancy, and also for protection of the rights of the landlord on the footing that the surrendering tenant had to be treated as though he was dead. It also follows that if his assets are to go to his heir the law must provide for the payment of his liabilities also by the heir who takes up the tenant-right. The law cannot be just to one and unjust to another. It has to provide for payment of surrendering tenants' liabilities as a condition precedent to the heirs recovering possession from the landlord or the transferee. The liability for such arrears of rent is of such a nature that an heir takes the tenant-right subject to that liability. See *Janki Bai* v. *Bayabai* (17). The case in *Sri Ram Jankiji* v. *Jagdamba Prasad* (18) is, therefore, easily distinguishable from the case of such a liability. It, therefore, follows that the surrender though it stood in the name of the landlord enured for the benefit of all persons interested in the succession, and if it was in evasion of s. 46 of the Act, it accelerated their succession, but if it was *bona fide*, it put an end to the tenancy. The necessary corollary was that where there exists a heirarchy of interests amongst persons interested in the reversion including the landlord as the last link in the chain it must enure in the order in which the interest would have gone in succession to such persons and in their absence to the landlord. This is how the provisions were understood

(16) 82 Ind. Cas. 966; 26 Bom. L. R. 779; (1924) A. I. R. (P. C.) 209; 20 L. W. 417; 47 M. L. J. 401; (1924) M. W. N. 719; 48 B. 569; 22 A. L. J. 962; 40 C. L. J. 447; 35 M. L. T. 941; 51 I. A. 368; 29 C. W. N. 271; 1 O. W. N. 505; 3 Pat. L. R. 9 (P. C.).

(17) (1902) 16 C. P. L. R. 55 at p. 57.

(18) 61 Ind. Cas. 3; 43 A. 374 at p. 376; 19 A. L. J. 129; 3 U. P. L. R. (A.) 33.

by those who had the exclusive jurisdiction to deal with the matter on the revenue side. The surrendering tenant was to be treated as dead and the succession was accelerated : *vide* Revenue Rulings noted under s. 36, Central Provinces Tenancy Act, in Chitale's Digest of Local Rulings. I give below the head-note of only one ruling —*Ramkrishna* v. *Lakhanlal* :

" Sections 36 and 47 of the Central Provinces Tenancy Act XI of 1898, confer the right to be put in possession of the surrendered or transferred holding on all persons in the line of the heirs and declare that this right shall accrue in the order in which such persons would have inherited the right of the tenant in the holding if the tenant had died. The right to apply is not dependent on the existence or non-existence of heirs nearer to the tenant than the applicant but simply on the point whether the applicant himself could inherit, if no such nearer heirs existed. Such near heirs are entitled to the first refusal of the right, but if they do not claim the holding, the right is open to any person who, if their intervening heirs had been non-existent at the time of the transfer, would be entitled to inherit the tenant's right".

If a female relation who is the heiress of the out-going tenant takes advantage of this provision of law she does so in virtue of her position *as such an heiress* and not independently of it, and if she pays the money she pays it not for acquiring a new right but in discharge of an obligation which attaches to her in that capacity. Having come into possession *as an heiress* she cannot claim to hold it in any independent right. Where a grantor, who has no title, purports by deed to convey a piece of land to *A* for life with remainders over, and *A* enters upon the land under the deed, and afterwards acquires a good title by possession against the true owner, *A* and his privies are respectively estopped, as against the remainder men, from disputing the validity of the deed : *Dalton* v. *Fitzgerald* (19) followed in *Appa Rao* v. *Gopala Row* (20). The principle underlying these cases has been followed by Mittra, A. J. C., in *Sheo Lal* v. *Sheorajia* (21), as the following observations will show :—

" When a person enters on land under a title as heir which is necessarily a limited title, as in the present case, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner".

Not only the female is estopped in asserting an independent title but everybody else claiming under her is absolutely estopped from asserting it. Her intention to treat the property thus acquired as her *stridhan* has to be made out by very cogent evidence. This has not been done in the present case.

On the contrary Exs. P-2 and P-3 afford clear proof of an unmistakeable intention on *Musammat* Bahena's part to assert her right *as an heiress* of her son ; there is nothing on record beyond the mere fact that she found out the small amount of Rs. 28 required to re-habilitate her in the tenant-right which she succeeded in getting by the fiction of death of the surrendering tenant, which can be said to be sufficient to show that she intended to treat the tenancy as though it was her self-acquisition. If a person incurs a debt even on a personal covenant in order to discharge his own liability as an heir, he does not thereby evince an intention to hold the interest secured by the discharge of his own liability as a new acquisition in his own hands. By discharging the debt otherwise than out of the assets in respect of which the liabilities existed, he improves the value of the assets by freeing it from the liability subject to which he took them.

A female heir derives no stronger title from the fact that the Inam Commissioner has enfranchised in her name property inherited from a male and has given a new title-deed in her name : *Vangala Dikshatulu* v. *Vangala Gavaramma* (22), *Kashi Prasad* v. *Inda Kunwar* (23), Mayne's Hindu Law, paragraph 609 of 9th Edition. On the same analogy mere selection by the Revenue Officer of a particular heir does not invest him with a new tenancy.

The repeal of s. 36 of the old Tenancy Act and the provision of s. 89 of the new Tenancy Act of 1920 which enables the tenant to act even unilaterally has not affected the rights of the heir at civil law. Its only effect was to abolish the special summary and speedy remedy and also the special *forum*, but it has left intact the rights as also the remedies available to him

(19) (1897) 2 Ch. D. 86 at p. 93; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685.
(20) 18 M. L. J. 409; 4 M. L. T. 5; 31 M. 321.
(21) 23 Ind. Cas. 719; 10 N. L. R. 35 at p. 37.
(22) 28 M. 13.
(23) 30 A. 490.

under the general civil law including the personal law by which he is governed.

For all these reasons I am of opinion that the view taken in *Premlal* v *Bhagchand* (1) is not in consonance either with Hindu Law or the Tenancy Law, as I understand it, and I, therefore, respectfully dissent from it and hold that the interest of *Musammat* Bahena was not absolute and that the plaintiff could not, therefore, succeed to the holding as though she was a fresh stock of dissent.

Baker, J. C.—I agree and have nothing to add.

By the Court.—The facts of this case have been set forth in detail in the Order of Reference and also in the opinions recorded by the Bench. As held by the Bench the reported decision in *Premlal* v. *Bhagchand* (1) does not lay down the law correctly. That decision, therefore, stands overruled. It, therefore, follows that plaintiff who is the sister's son, *i. e.*, a *bhinnagotra Sapinda* of the last propositus Dewaji, is not entitled to succeed to the holdings in preference to the defendant Bhiwa who is a *sagotra sapinda* of Dewaji.

The suit was rightly dismissed by the Courts below. The appeal, therefore, fails and is dismissed with costs. Costs in the lower Courts will be paid as already ordered.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 134 OF 1924.

March 3, 1925.

Present:—Mr. Baker, J. C.

JAGO—DEFENDANT—APPELLANT

versus

MADHORAO—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 89—Surrender to some co-sharers, not recognised by lambardar, *effect of—Suit for rent after such surrender, whether maintainable.*

A surrender made by a tenant to some co-sharers of a village without the intervention of the *lambardar* is a transfer and does not put an end to the tenancy unless the *lambardar* chooses to recognise it. Such a transfer is no bar to a suit by the *lambardar* for recovery of rent from the tenant.

Appeal against a decree of the District Judge, Nagpur, dated the 30th November 1923, in Civil Appeal No. 154 of 1923.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *M. B. Kinkhede*, R. B., for the Respondent.

JUDGMENT.—The plaintiff who is the *lambardar* sued the defendant for rent for the *fasli* year 1329. The defendant pleaded that he had surrendered the field in 1919 and was not liable to rent.

The lower Appellate Court awarded the plaintiff's claim. Defendant makes this second appeal.

The so-called surrender was admittedly made to two of the co-sharers without the intervention of the *lambardar*. Such a transaction is a transfer not a surrender, and does not put an end to the tenancy unless the *lambardar* chooses to recognize it: *cf. Ramdayal* v. *Gulabia Bai* (1), where it is stated that an express surrender by a tenant of his tenant right can only be effected by a contract between the tenant and his landlord. The plaintiff is, therefore, not bound to recognize the transfer, nor is any arrangement between the co-sharer and the tenant binding on plaintiff.

As to the alleged credit given by the plaintiff to the co-sharers, in a suit between him and them, for the profits of the land during the year in suit, this plea was never raised in the First Court, though the credit was given before the disposal of the present suit.

There is nothing more to be said than has been said by the learned District Judge. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 4 N. L. R. 120 at p. 123.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 55 OF 1923.

March 13, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Chaudhri ABDUL WAHHAB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat TAHIRA BANO AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Wajib-ul-arz, *entry in, value of—Record of custom followed by pious wish, effect of—Construction of document—Mistake, obvious, whether can be corrected by Court.*

Where a mistake in the expression of a written contract is obvious upon the face of the instrument so as to leave no doubt of the intention of the parties

without extrinsic evidence to explain it, the mistake is corrected as a mere matter of construction and the contract is construed in accordance with the obvious intention of the parties, both at law and in equity. [p. 53, col. 2.]

An entry in a *wajib-ul-arz* stated that under certain circumstances a widow would succeed to a certain share of her husband's property "with power of alienation." The other conditions laid down in the entry showed clearly that the widow was not meant to have a power of alienation:

Held, that the word "with" before "power of alienation" was evidently a clerical mistake for the word "without" and the obvious intention was that a widow succeeding under the circumstances detailed in the entry should have no power of alienation. [p. 53, cols. 1 & 2.]

An entry in a *wajib-ul-arz* recording a custom against the authenticity of which nothing is shown, is sufficient proof of the custom recorded. [p. 53, col. 2.]

The effect of an entry in a *wajib-ul-arz* recording a definite custom is not destroyed by the expression of a pious wish on the part of the co-sharers which follows the record of custom. [p. 54, col. 1.]

Appeal against a decree of the Subordinate Judge, Mohanlalgunj at Lucknow, in Suit No. 61 of 1922, dated the 28th September 1923.

Mr. *M. Wasim*, for the Appellants.

Mr. *Naziruddin*, for the Respondents.

JUDGMENT.—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Mohanlalganj, dated the 28th September 1923. By this decree the plaintiffs' suit was dismissed. Hence this appeal. This suit as originally instituted was for a relief of declaration that certain alienations made by *Musammat* Sartaj-un-nissa defendant No. 1 in favour of her daughter, *Musammat* Tahira Bano, defendant No. 2, and in favour of defendant No. 3, Jagannath, were ineffectual beyond the lifetime of the alienor and were not binding on the plaintiffs. *Musammat* Sartaj-un-nissa died during the pendency of the suit. In consequence of her death her name was removed from the array of the defendants and the plaint was further amended by including the relief for possession of a six pies share in village Nagram Purab and a similar share in village Garha.

The property in suit is a moiety of a one anna share in each of the villages mentioned above. This share originally belonged to one Chaudhri Abdul Rahim, who died on the 20th July 1910. Chaudhri Abdul Rahim was married twice. His first wife was *Musammat* Latif-un-nissa, from whom he had a son, Chaudhri Abdul Hakim who died in 1921. The three plaintiffs in the suit, out of which this appeal arises, are the sons of Chaudhri Abdul Hakim. Chaudhri Abdul Rahim's second wife was *Musammat* Sartaj-un-nissa. From her was born *Musammat* Tahira Bano, defendant No. 2. On the death of Chaudhri Abdul Rahim his inheritance was divided into two equal shares. One of such shares went into the possession of Chaudhri Abdul Hakim and the other share into the possession of his widow, *Musammat* Sartaj-un-nissa. *Musammat* Sartaj-un-nissa made a mortgage of a portion of the property in her possession in favour of Jagannath defendant No. 3 and subsequently on the 7th August 1920 she executed a deed of gift in respect of the entire share in her possession in favour of her daughter, *Musammat* Tahira Bano, and put her in possession thereof. The donee in her turn made certain alienations in favour of the remaining defendants, Sukhnandan No. 4, Bandidin No. 5 and Ram Lal No. 6. The title on which the plaintiffs claimed possession of the share in suit was founded on a custom prevailing in the village and the family of Chaudhri Abdul Rahim to the effect that on the death of a proprietor, leaving two widows, his property is divided into two equal portions and the sons born of each of the two widows take the share allotted to their mothers. If one of the widows has no male issue she enjoys possession of the share allotted to her for her lifetime without power of alienation and on her death that share reverts to the sons or grandsons of the other widow and that daughters do not inherit in any case. On behalf of the defendants the custom put forward by the plaintiffs was admitted except in respect of two particulars. They denied that the widow had no power of alienation and said that she had. They further denied the exclusion of daughters from inheritance.

The lower Court has found that the sonless widow succeeds to the half share of the estate with power of alienation and it has also found that the daughter of a sonless widow succeeds to the share of her mother. Both these findings are impugned in the appeal.

Chaudhri Abdul Rahim was the resident of the village Nagram and one part of his property is situate in that village and another part in vlllage Garha. On the issue arising out of the plea of custom three *wajib-ul-araez* were produced as evidence in the case. It appears that Nagram

is divided into several *mahals*, one of them is called Nagram Dakhan and is owned by Sunni Saiyid co-sharers, another is Nagram Purab, the co-sharers of which are Sunni Chaudhris. Exhibit 15 filed by the plaintiffs relates to the former and Ex. A-6 filed by the defendants to the latter *mahal* Another *wajib-ul-arz* filed by the defendants (Ex. A-10) is of village Ahmadpur situate at a distance of two miles from the village Nagram. Abdul Rahim was not a co-sharer in village Ahmadpur nor did he reside there. To my mind, therefore, the evidential value of Ex. A-10 is very little or none. In Ex. 15 the earlier portion of the entry relating to the custom is the one which is admitted on both sides in the present case. The particular entry in controversy is stated as follows:—

"If one widow has sons and the other has not, then the latter possesses her share in the estate of her husband for her life and without power of alienation and on her death that share also goes into the possession of the sons of the other widow. In case one widow has male issue and the other widow has female issue then on the death of the latter widow, the daughter or her issue does not get the share but that share also goes into the possession of the male issue of the other widow." The language of which I have given the translation is perfectly unambiguous and definite and there is no suggestion that in making the entry of the custom the Settlement Officer was guilty of any dereliction in the discharge of his official duties. The entry, therefore, proves the custom relied upon by the plaintiffs in its entirety. The entry, in Ex. A-6 as to the custom is exactly the same as in Ex. 15 except with this difference that instead of the words *bila ikhtiar intiqal* (without power of alienation) appearing in Ex. 15 the words in Ex. A-6 are *ba ikhtiar intiqal* (with power of alienation).

The argument on behalf of the plaintiffs is that the word '*ba*' is a mistake for '*bila*' rendered in English the argument comes to this that the writer of the entry in Ex. A-6 has omitted the word 'out' between 'with' and 'power of alienation.' The lower Court has rejected this contention. To my mind it is a clear case of a clerical mistake. The entire context of the entry in Ex. A-6 and the setting in which the words "*ba ikhtiar*" are placed disclose beyond any reasonable doubt that the word '*ba*' has been written by mistake and that it was intended to be written '*bila*.' Immediately after the words in dispute in Ex. A-6 comes the following clause: "And the male issue succeeds to the share of his mother and after the death of the widow without the male issue her share also goes into the possession of the male issue of the other widow." Having regard to the context in the portions quoted above I have translated the word "*aulad*" as indicating male issue only and I have no doubt in my mind that that is right. In the case of *Wilson* v. *Wilson* (1), Lord St. Leonards said: "Now it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes—without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty." The rule is stated in Kerr on Fraud and Mistake, Fifth Edition, at page 523, in the following words:—

"Where the mistake in the expression of a written contract is obvious upon the face of the instrument so as to leave no doubt of the intention of the parties without extrinsic evidence to explain it, the mistake is corrected as a mere matter of construction, and the contract is construed in accordance with the obvious intention, both at law and in equity."

As regards the exclusion of daughters Ex. A-6 is equally clear. It says: "That according to the Muhammadan Law the female issue gets a share side by side with the male issue but in our family she does not get any share in the presence of a male issue." The importance of the entry as to a custom recorded in a *wajib-ul-arz* against the authenticity of which nothing is shown was emphasized by their Lordships of the Privy Council in the recent case of *Balgobind* v. *Badri Prasad* (2).

(1) (1854) 5 H. L. C. 40 at p. 66; 10 E. R. 811 at p. 822; 23 L. J. Ch. 697; 101 R. R. 25.

(2) 74 Ind. Cas. 449; 50 I. A. 196; (1923) A. I. R (P. C.) 70; 21 A. L. J. 578; 9 O. & A. L. R. (P. C.) 581 26 O C. 217; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302 (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 29 C. W. N. 465 (P. C.).

The defendants lay much stress on the *wajib-ul-arz* of village Ahmadpur (Ex. A-10) as showing the non-exclusion of the daughter from inheriting that share of her father's estate which is allotted to her mother on a partition between the two widows after the death of the father, under the custom. Exhibit A-10 as much as Ex A-6 is quite clear on the point that the sonless widow enjoys possession of the share allotted to her only for her lifetime and without power of alienation. After the recital of this part of the custom Ex. A-10 proceeds to state: "But when the widow dies then her share also goes into the possession of the sons of the other widow." Later the entry is as follows:— "Although according to the Muhammadan Law it is permissible for a daughter to receive a share side by side with a son but there is no such usage in our family." If this *wajib-ul-arz* had ended here there could be no question that a daughter was not entitled to any share in the inheritance of her father in the presence of a son. At the end, however, we find this statement: "If there are two widows one of whom has male issue and the other has a daughter or daughters, in that case such a daughter may get the share of her mother." There is thus an apparent inconsistency between the earlier and the latter portion of the entry. But is this inconsistency real? My answer is in the negative. The last portion is merely an expression of a pious wish on the part of the co-sharers of the village and is not sufficient to destroy the pre-existing custom recorded in the previous portion of the entry. I am, therefore, of opinion that these *wajib-ul-araez* establish the custom relied upon by the plaintiffs in its entirety.

As against the custom in favour of the non-existence of a power of alienation in the widow, the learned Subordinate Judge relies upon certain instances in which such widows have made alienations. The first instance is one of *Musammat* Nurunnisa, who sold a portion of the estate which originally belonged to her husband under a sale-deed dated the 25th May 1888 (Ex. A-7). This is not a true instance in support of the power of alienation. The evidence proves beyond any shadow of doubt that the widow gave birth to a posthumous son, who died within six months of his birth. Thus the real successor to the estate was the son and whatever the widow got she got by right of inheritance as a mother to her son. The second instance of an alienation made by one *Musammat* Sattarunnisa is not supported by any documentary evidence. As pointed out by the plaintiffs' learned Counsel, the donee under this alienation was the sole reversioner who could have contested it. Next, we come to four alienations made from time to time by one *Musammat* Nasibunnisa. The collateral were two, Sadiq Husain and Bunyad Husain. The earliest of these alienations is a sale-deed of the 17th June 1907 (Ex. A-8). Sadiq Husain consented to the alienation by being an attesting witness to the sale-deed. The second alienation in point of time is a mortgage dated the 20th January 1911 (Ex. 12). Both Sadiq Husain and Bunyad Husain attested the document. Then comes a sale-deed of the 1st November 1915. Sadiq Husain and Bunyad Husain joined the widow in executing the deed in question. On the 18th January 1921 the widow made another mortgage (Ex. A-13). The money was borrowed for the expenses of the daughter's marriage. Sadiq Husain identified the widow at the registration of the document. Lastly, comes another mortgage of one plot of land made by the widow on the 1st August 1921 (Ex. A-14). Finally, we have the case of one *Musammat* Bisar. Her share of 6-pies in Nagram was sold in execution of a decree more than 30 years ago. No details of the nature of the debt or of the decree itself are forthcoming.

As regards the custom of exclusion of daughters reliance is placed upon an instance of the alleged succession of the daughter of one Munawar Ali. It is said that Munawar Ali had two wives, *Musammat* Bisar and a barber girl named Chunmunia. From the former he left a daughter *Musammat* Syedunnisa and from the latter two sons, Husain Ali and Mubarak Ali. It is alleged that the daughter inherited the share of her mother. The plaintiffs question the legitimacy of Husain Ali and Mubarak Ali. In any event the instance is involved in obscurity and is not of sufficient importance to rebut the custom established by *wajib-ul-arz*.

Reliance is also placed on the side of the defendants on a litigation in the year 1899 between Ewaz Ali and *Musammat* Mahbubunnisa, widow of Riasat Ali. Ewaz Ali was the brother of Riasat Ali. *Musammat* Mahbubunnisa was the sister of Abd Rahim. The plaint challenged the pow of alienation on the part of the wid

The written statement asserted it. This written statement was verified by Abdul Rahim as an agent for his sister, *Musammat* Mahbubunnisa. Abdul Rahim also gave evidence in the case as a witness on his sister's side. Finally the suit ended in a compromise (Ex. 5). The attitude taken by both Abdul Rahim and his sister in this litigation was in the interest of the latter and in the circumstances it is very much to be doubted whether they were speaking the truth in the matter of the custom. By the compromise Ewaz Ali and *Musammat* Mahbubunnisa divided the property of Riasat Ali. The widow's claim in respect of her dower was also recognized. In the circumstance, therefore, the litigation and its sequel is not of much evidential value on the point under consideration. On these grounds I am of opinion that the plaintiffs are entitled to succeed.

The result is that the appeal is allowed, the decree of the lower Court is reversed and the plaintiffs' suit is decreed with costs in both Courts.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 24-B OF 1924.

December 19, 1924.

Present:—Mr. Prideaux, A. J. C.

Musammat BHAGI—DEFENDANT—APPELLANT

versus

KASHIRAM—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 3—Civil Procedure Code (Act V of 1908), s. 9—Suit for possession of property on behalf of minor—Defendant claiming to be in possession as guardian of minor—Suit, whether maintainable—Jurisdiction of Civil Court.

The appointment of a guardian for a minor's person and property is a matter specially within the provision of the Guardians and Wards Act. That Act is intended as a complete Code dealing with the rights and remedies of wards and guardians, and all questions touching the relations of these should be dealt with under the provisions of the Act. No suit under the ordinary law will, therefore, lie to establish a right of guardianship. For this purpose an application must be made under the Act. [p. 56, col. 1.]

The maternal grandfather of a minor brought a suit on behalf of the minor as his next friend to recover certain moveable and immoveable property against the minor's father's step-mother who admitted the title of the plaintiff to the property but claimed that she was lawfully managing the same as the guardian *de jure* of the minor plaintiff:

Held, that the question was one to be decided under the provisions of the Guardians and Wards Act and that the suit was not, therefore, maintainable in the Civil Court. [p. 56, col. 2.]

Case-law referred to.

Miscellaneous appeal against a decree of the District Judge, Akola, dated the 22nd of April 1924, reversing that of the Additional Subordinate Judge, Akola, dated the 22nd of September 1923.

Mr. *G. G. Hatwalne*, for the Appellant.

Mr. *A. V. Khare*, for the Respondent.

JUDGMENT.—This case was brought by the maternal grandfather of the minor Nathoo as his next friend, to recover possession of certain moveable and immoveable property together with profits for the year 1922-23, against the plaintiff's father's step-mother. Plaintiff's ownership to the property was admitted but the defendant claimed that she was lawfully managing the same as the guardian *de jure* of the minor plaintiff and has not done any acts of mismanagement, and that, therefore, the property could not be taken from her. The First Court found that it had no jurisdiction to try the suit, and that the suit is not maintainable as the plaintiff's next friend should have applied to the District Court under the Guardians and Wards Act.

On appeal this main question of the case has been decided by the lower Appellate Court, that Court holding that the suit is maintainable. The decree of the First Court has been reversed and the suit has been remanded under the provisions of O. XXI, r. 23, of the C. P. C.

No exactly similar case has been shown me. It is argued for the appellant that under s. 3 of the Guardians and Wards Act the order of the First Court is correct. Now, it seems to me that even when an application is made to a District Court to appoint a guardian of the person and property, and in the present case property is in dispute, that Court may or may not proceed with the case. It does not follow that in every case a guardian is appointed; and we know that in the case of most minors no such guardian is ever appointed, the minor suing when necessary by his next friend and defending a case by his guardian *ad litem*. If in the present case the defendant was not a person who claimed to be the guardian *de jure* of the minor,

and the minor sued for possession of his property, there is no doubt that a case would lie. Does the fact that the defendant is the plaintiff's father's step-mother, and as such claims a right to be in possession of the property as guardian, make any difference in the case? I am hampered in coming to a conclusion by the want of authority.

For the appellant *Annie Besant* v. *Narayaniah* (1), *Sham Lal* v. *Bindo* (2), a case brought by a Hindu father for charge of his child, *Sathi* v. *Ramandi Pandaram* (3), *Gulabchand* v. *Moti* (4), and *Hazara Bibi* v. *Sulaiman Haji Mohammad* (5) are quoted. For the respondent I am referred to *Prosunno Coomar Paul* v. *Koylash Chunder Paul* (6). *In the matter of the petition of Kashi Chunder Sen* (7), *Mathuraban* v. *Tewari* (8) and *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (9).

Section 9 of the C. P. C. lays down that the Civil Courts have jurisdiction to try all suits of civil nature except suits of which cognizance is either expressly or impliedly barred. There is no question that the appointment of a guardian for a minor's person and property is a matter especially within the provisions of the Guardians and Wards Act, and that Act seems to have been intended as a complete Code dealing with the rights and remedies of wards and guardians, and all questions touching the relations of these should be dealt with under the provisions of that Act. No suit under the ordinary law will, therefore, lie to establish the right of guardianship, but an application must be made under the Act: *Sham Lal* v. *Bindo* (2).

In the present case the real question for decision is whether the defendant has the right as a guardian to manage the minor's propery for him or whether the next friend, the maternal grandfather of the minor, should be given possession of that property on behalf of the minor. It seems to me that this question is one for the Court to decide under the Guardians and Wards Act in whose power the appointing of a guardian lies.

I, therefore, set aside the order of the lower Appellate Court and restore that of the Trial Court dismissing the case. Parties will bear their own costs.

Z. K. *Order set saide.*

(1) 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 12 A. L. J. 1155; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 41 I. A. 314 (P. C.).

(2) 26 A. 594; 1 A. L. J. 266; A. W. N. (1904) 135.

(3) 53 Ind. Cas. 399; 42 M. 647; 9 L. W. 600; 37 M. L. J. 93; 26 M. L. T. 61; (1919) M. W. N. 487.

(4) 25 B. 523; 3 Bom. L. R. 795.

(5) 59 Ind. Cas. 562; 13 Bur. L. T. 86.

(6) 8 W. R. 428 at p. 436; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 327.

(7) 8 C. 266; 10 C. L. R. 91; 6 Ind. Jur. 359; 4 Ind. Dec. (N. S.) 169.

(8) 44 Ind. Cas. 753; 10 Bur. L. T. 186.

(9) 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 99 OF 1924.

November 17, 1924.

Present:—Mr. Justice Pratt.

MAUNG YAN KWIN—APPELLANT

versus

MAUNG PO KA—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 116, 120—Transfer of Property Act (IV of 1882), s. 68—Mortgage—Mortgagee deprived of security—Suit to recover mortgage-money—Limitation, commencement of.

Where a mortgagee is deprived of his security owing to the default of the mortgagor, limitation for a suit to obtain a personal decree against the mortgagor for the mortgage-money would begin to run under Art. 116 or Art. 120 of Sch. I to the Limitation Act from the date on which the mortgagee is deprived of the security, that is to say, the date on which he is evicted from possession of the mortgaged property.

Second appeal against the decree of the District Court, Myingyan, in Civil Appeal No. 103 of 1924.

Messrs. *Sanyal* and *S. Mukerjee*, for the Appellant.

Mr. *Kale*, for the Respondent.

JUDGMENT.—Plaintiff sued in the Township Court to recover Rs. 192-12-0 advanced on a mortgage of land, which was subsequently made over to the decree-holders in Civil Regular Suit No. 314 of 1914 of the Township Court, Taungtha, by order of the Court on October 6th 1917.

The Trial Court found the mortgage proved and, as the security was lost to plaintiff, granted a decree for the money advanced.

On appeal the Judge of the District Court held that, although the mortgage purported to be usufructuary, as a matter of fact it was not, because plaintiff never obtained possession of the land.

Plaintiff's case was that defendant after

the mortgage remained in possession of the land as lessee and there was some evidence to this effect. Plaintiff was also made a party to the previous suit because of his connection with the land.

I see no reason to doubt that plaintiff was in constructive possession at the time of the previous suit and in any case the deprivation of the security for the mortgage would give plaintiff a cause of action for the recovery of the principal. The District Court, however, held that Art. 116 of the First Schedule to the Limitation Act applied, and that the period of limitation dated from the execution of the deed of mortgage. The suit was accordingly dismissed as time-barred. Assuming that the view of the District Court that Art. 116 applies is correct, it is obvious, that under the circumstances the starting point for limitation will not be the date of the document, but of the deprivation of the security.

If defendant did not give plaintiff actual possession after the mortgage, he remained in possession with the plaintiff's consent and there was no breach of the conditions of the mortgage prior to Suit No. 314 of 1914.

Limitation would, therefore, run from the date on which plaintiff was deprived of his security and that was on the 6th October, 1917, when the decree-holder in the previous suit was placed in possession.

If Art. 120 of the First Schedule to the Limitation Act be applied, the suit will still be within time since limitation will start from the date of eviction from the land.

This is in accordance with the principles enunciated in *Unichaman* v. *Ahmed Kuthi Kayi* (1) and *Ram Jewan Misser* v. *Jagarnath Pershad Singh* (2).

The lower Burma ruling cited by the Judge of the lower Appellate Court does not support the view taken by him on the question of limitation. This suit was not on the face of it obviously barred by limitation and the lower Appellate Court did not exercise a wise discretion in taking up the question of limitation on its own initiative.

I set aside the decree of the District Court and restore the decree of the Township Court with costs throughout.

Z. K. *Appeal allowed.*

(1) 21 M. 242; 8 M. L. J. 81; 7 Ind. Dec. (N. S.) 527.
(2) 25 C. 450; 13 Ind. Dec. (N. S.) 299.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 4 OF 1925.
February 23, 1925.
Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

BAIKUNTHA KUMAR SHIL—PLAINTIFF—PETITIONER
versus
SARAT CHANDRA NATH AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Registration Act (XVI of 1908), s. 77—Registration suit—Parties.

The only person who can present a document for registration or institute a suit for the purpose under s. 77, Registration Act, is the person claiming under the document, and the only person who is entitled to deny execution is the executant. [p. 58, col. 1.]

The scope of s. 77, Registration Act, is limited only to the enquiry as to whether the document has been executed by the person alleged to have executed it. [*ibid.*]

In a suit under s. 77, Registration Act, the Court is concerned not with the validity but with the genuineness of the document sought to be registered. The question of its validity must be determined in a suit properly framed for the purpose. [p. 58, cols. 1 & 2.]

Dwijendra Narain Roy v. *Jogesh Chand Dey*, 79 Ind. Cas. 520; 39 C. L. J. 40; (1924) A. I. R. (C.) 600, relied on.

In a suit to compel registration of a deed of alienation under s. 77, Registration Act, a prior purchaser from the alienor is not a proper party, and cannot be allowed to join as a defendant. [p. 58, col. 2.]

A 'proper party' means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in issue. [*ibid.*]

Rule against an order of the Munsif, Sixth Court, Comilla, in Title Suit No. 258 of 1924.

Babu *Birendra Chandra Das*, for the Petitioner.

Babu *Bhagirath Chandra Das*, for the Opposite Parties.

JUDGMENT.—This Rule is directed against an order of the Munsif, Comilla, adding the opposite party as defendants in a suit brought by the petitioner under s. 77 of the Indian Registration Act. The petitioner's case is that one Jaladhar Sen executed a *kobala* in his favour which the petitioner presented for registration before the Sub-Registrar. Execution was denied by Jaladhar and registration was refused by the Sub-Registrar as well as by the District Registrar on appeal and the petitioner consequently brought the present suit under s. 77 of the Registration Act for the purpose of having the document registered by the Civil Court. The opposite party applied to the Munsif to be added as defendants on the ground that they had pre-

viously purchased the property purporting to be conveyed by the *kobala*. The learned Munsif admits that the only real issues in the suit are, first, whether defendant has executed the deed; and, secondly, whether the document is a genuine one. But as he is of opinion that the opposite party should be added as defendants in order to enable the Court to completely and effectively adjudicate upon and settle all the questions involved in the suit, he allowed the application of the opposite party to be added as defendants. The learned Munsif does not explain what he means by 'all the questions involved in the 'suit'. In a suit under s. 77 of the Registration Act the only question is whether or not the document purported to have been executed by a certain person is executed by that person. When a document is presented for registration and the execution of it is denied, the Sub-Registrar refuses to register it under s. 71. An application is thereupon made to the Registrar against the order refusing to register the document under s. 73 by any person claiming title under the document. Under s. 74 of the Registration Act the only issue which the Registrar is called upon to decide is whether the document has been executed. If the Registrar is of opinion that the document has not been executed by the person purported to have executed it he shall refuse registration under s. 76. Section 77 provides that "where the Registrar refuses to order the document to be registered, under s. 72 or s. 76, any person claiming under such document may.....institute in the Civil Court.....a suit for a decree directing the document to be registered in such office if it be duly presented for registration." Reading these sections together it is clear that the only person who can present a document for registration or institute a suit is the person claiming under the document, and the only person who is entitled to deny the execution is the person who is purported to be the executant of it. The scope of s. 77 of the Registration Act is limited only to the enquiry as to whether the document has been executed by the person alleged to have executed it. In the case of *Dwijendra Narain Roy* v. *Jogesh Chandra Dey* (1), it was observed at page 47*: 'it may be conceded that in a suit instituted under s. 77, the Court is concerned, not with the validity but with the genuineness of the document sought to be registered, *i. e.*, whether the document has been executed by the person by whom it is alleged to have been executed; the question of its validity must be determined in a suit properly framed for the purpose'. The case cited in the above case shows that even a defence as to the executing power of the alleged executant or the document being one void for want of consideration; fraud or undue influence is foreign to a suit under s. 77. The learned Vakil for the opposite party argues that his clients want to be parties to the suit in order to show that, as a matter of fact, the defendant never executed the document. In our judgment he cannot be allowed to do so. The only person who is entitled to deny execution is the person who is alleged to have executed the document.

It is next argued that the opposite party are proper parties because they are interested in the result of the suit. In the first place, they are not the persons interested in the result which only means, if the suit is decided in favour of the plaintiff, that the document is executed by Jaladhar Sen. It would not necessarily show that Jaladhar had a transferable interest in the property. In the second place, the expression 'proper party' means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in issue. In the present case, if the opposite party is added as defendants and Jaladhar Sen comes into Court and admits execution of the document, the opposite party will have nothing to say against it. We do not think that they are persons who ought properly to be joined as defendants in the suit in order to convert a simple suit under s. 77 of the Registration Act into a title suit which may involve intricate questions.

The Rule is made absolute and the order of the lower Court set aside. The petitioner is entitled to his costs of this Rule. We assess the hearing-fee at two gold *mohurs*.

N. H. *Rule made absolute.*

(1) 79 Ind. Cas. 520; 39 C. L. J. 40; (1924) A. I. R. (C.) 600.

*Page of 39 C. L. J.—[*Ed.*]

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 640 OF 1923.

February 10, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GANAPPA PUTTA HEGDE—DEFENDANT—APPELLANT

versus

HAMMAD SAIBA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Transfer of Property Act (IV of 1882), s. 55 (2)—Sale of immoveable property—Vendor having no title—Vendee not put in possession—Suit to recover amount of consideration—Limitation, commencement of.

A contract of sale of immoveable property implies a covenant for title on behalf of the vendor. Where it subsequently turns out that the vendor had no title to the property which he purported to sell and the vendee, who was not put in possession of the property, brings a suit against the vendor to recover the amount of the consideration paid by him for the sale, the suit is one for compensation for the breach of a contract in writing registered within the meaning of Art. 116 of Sch. I to the Limitation Act and limitation begins to run from the date of the sale. [p. 60, col. 2.]

The word "compensation" in Art. 116 of Sch. I to the Limitation Act is not restricted to a claim for liquidated damages and includes a claim for a sum certain. [p. 61, col. 1.]

Second appeal from the decision of the District Judge at Karwar, in Appeal No. 157 of 1922, confirming that of the Subordinate Judge at Honawar, in Civil Suit No. 91 of 1921.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

Macleod, C. J.—There were five cousins, Bommanna, Timmanna, Puttayya and Subbayya, sons of Bomma Hegde, and Ganapa Manj Hegde, living separate. Ganapa died leaving a widow Venkamma as heir to his property. Puttayya and Subbayya died during her lifetime, so that on the death of Venkamma Bommanna and Timmanna succeeded to her property as reversioners. Puttayya's son representing that he was entitled to half the property of Ganapa sold it to the plaintiff in this suit for Rs. 400 on April 4, 1915. Rs. 150 were paid in cash, and for the balance the plaintiff passed a mortgage on certain of his properties. The plaintiff, when he was unable to get possession owing to the obstruction of Bommanna and Timmanna, purchased the land from them and obtained possession on April 4, 1921. He sued Puttayya's son to recover the Rs. 150 and to obtain a declaration that the mortgage-bond was satisfied. The defendant pleaded that he did not make any representation to the plaintiff, that the plaintiff bought agreeing to take all risks, and that the suit was not in time.

As the plaintiff had not paid the necessary Court-fees with regard to the declaration sought for that the mortgage-bond had been satisfied, he gave up his claim for the declaration.

The Trial Judge held that the defendant had no title to the land sold by him, that he was not induced to sell on the representation alleged to have been made by the plaintiff, that the suit was filed in time, and passed a decree for Rs. 150 with costs and future interest at six per cent.

The defendant had contended that the suit was one for relief on the ground of fraud, and that as the plaintiff had become aware of the fraud, more than three years before the suit was filed, the suit was barred applying Art. 95 of the First Schedule of the Indian Limitation Act. The learned Judge considered that it was a suit for compensation for breach of a contract in writing registered, to which Art. 116 was applicable. Though there was no express covenant in the deed to make compensation for want of title, such a covenant could be implied from the representation made by the defendant.

In appeal the District Judge held that the sale was void *ab initio*, that under s. 55 (2) of the Transfer of Property Act, there was an implied covenant of title in the sale-deed, and that as it was registered, a suit for the recovery of the purchase-money fell under Art. 116, the starting point for limitation being the date of the sale as no possession had been obtained.

On the issue whether plaintiff agreed to take the risk of not getting possession the District Judge held that the defendant had not proved what he had alleged in his written statement. Accordingly the appeal was dismissed. In second appeal it was first contended that no appeal lay as the suit was of a Small Cause Court nature, the plaintiff having given up his claim for declaration asked for in the plaint.

We do not think that this contention is sound. The suit as framed was not a suit of a Small Cause Court nature, and it did not attain that character because the plaintiff gave up his claim to the declaration.

The question whether this is a suit for

compensation for breach of a contract in writing registered is more difficult. It has been argued on the authority of *Hanuman Kamat* v. *Hanuman Mandur* (1) that if a vendor without title sells to a purchaser and receives the purchase-money a suit for the recovering of the purchase-money falls under Art. 62 if the purchaser does not obtain possession, and under Art. 97 if he does obtain possession. The purchaser has bought a worthless piece of paper and consequently when endeavouring to recover the price paid he is not suing for compensation for breach of a contract. But it must be admitted that in the case referred to the question whether the suit could be considered as a suit for compensation for breach of a contract does not seem to have been considered. Their Lordships said at page 126* :

" If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandur. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time, to recover back his purchase-money upon a failure of consideration; and, therefore, the case appears to them to be within the enactments of Art. 97."

In *Subbaraya Reddiar* v. *Rajagopala Reddiar*(2) *A*, who had a title to certain immoveable property voidable at the option of *C*, sold it to *B* and put *B* in possession thereof. *C* then brought a suit against *A* and *B* and got a decree and obtained possession thereof in execution. It was held that *B*'s cause of action for the return of the purchase-money arose not on the date of the sale but on the date of his dispossession, when alone there was a failure of consideration, and that the Article applicable was Art. 97 of the Indian Limitation Act. The only question argued was at what date did the cause of action arise. On this question the Judge said a large number of cases were quoted which could be roughly classified under three heads: (*a*) where from the inception the vendor had no title to convey and the vendee had not been put into possession of the property, (*b*) where the sale was only voidable on the objection of third parties and possession was taken under a voidable sale, and (*c*) where though the title was known to be imperfect the contract was in part carried out by giving possession of the properties. In the first class of cases the starting point of limitation would be the date of the sale. Although s. 55 (2) of the Transfer of Property Act was referred to, it does not appear to have been argued that Art. 116 was applicable, the case was held to come within class (*b*) and Art. 97 was applicable.

In *Arunachala Aiyar* v. *Ramasami Aiyar* (3) the suit was filed in 1910 on a sale-deed of 1904. It turned out at the trial that, at the time of the sale, the first defendant had no title to convey. The plaintiffs then pressed their claim to recover the consideration money, to which the defendant pleaded the bar of limitation. The District Judge held the claim came under Art. 62 or Art. 97. The High Court held that it came under Art. 116 as a covenant for title was implied in the conveyance by s. 55 (2) of the Transfer of Property Act. It does not appear from the report whether the plaintiffs had got possession of the property sold.

It may be taken, therefore, that the defendant covenanted that he had a good title to the property sold, and in return for the sale-deed received a certain price. If the plaintiff can be said to be suing for compensation for breach of that covenant then Art. 116 is applicable. Whether that Article applies to suits for debts or sums certain due upon registered instruments was considered in *Lalchand Nanchand Gujar* v. *Narayan Hari* (4) and the Court held that there was a long series of cases in which that question had been decided in the affirmative, so that it accepted that body of authority. The Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (5) accepted the interpre-

(1) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. s.) 527 (P. C.).

(2) 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240; (1914) M. W. N. 376.

(3) 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J 517; 16 M. L. T. 397.

(4) 21 Ind. Cas. 315; 37 B. 656; 15 Bom. L. R. 836.

(5) 39 Ind. Cas. 156; 44 C. 759 at p. 768; 19 Bom. L. R. 450; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363, 5 L. W. 654; 44 I. A. 65 (P. C.).

*Page of 19 C.—[*Ed.*]

tation so often and so long put upon the Statute by the Courts of India, and thought that the decisions could not be disturbed. Therefore the word 'compensation' in Art. 116 need not be restricted to a claim for unliquidated damages, and can be held to include a claim for a sum certain as in this case. The appeal is dismissed with costs.

Coyajee, J.—I agree in holding that this second appeal is competent, but that it fails on the ground that the suit which has given rise to this appeal falls within Art. 116 of the Indian Limitation Act. The plaintiff brought the suit for the recovery of his purchase-money. On April 4, 1915, the defendant executed the sale-deed in question in favour of the plaintiff. Admittedly, the vendor had no title to the land which he purported to convey; and the vendee had not been put in possession of the land. The sale is consequently void *ab initio*. The sale-deed, however, was duly registered, and on the face of it a *prima facie* title was secured. For, it is enacted by s. 55, sub-s. (2) of the Transfer of Property Act—which applies to this case—that in the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which he professes to transfer to the buyer subsists and that he has power to transfer the same. Here, then, a covenant for title is implied, there being—according to the findings of the lower Courts—no contract to the contrary. The plaintiff's suit which is instituted within six years of the date of the sale is not barred by the Law of Limitation if Art. 116 applies. In my opinion it is a suit for "compensation for the breach of a contract in writing registered" and is governed by that Article: *Arunachala Aiyar* v. *Ramasami Aiyar* (3). The expression "compensation for the breach of a contract," used in that Article, is not limited to a claim for unliquidated damages, but applies also to a claim for payment of a sum certain: *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (5). It is true that Art. 116 does not in terms speak of a contract "express or implied", and here we have an implied contract only. But I agree with the opinion expressed by Fawcett, J., in *Multanmal Jayaram* v. *Budhumal Keval-Chand* (6), that the terms of that Article are sufficiently wide to include a case of the present kind, and that the words "express or implied," contained in Art. 115, are also intended to be read into Art. 116. The starting point of limitation in a suit of this nature is the date of sale, and the plaintiff's claim to recover back his purchase-money was, therefore, made within the statutory period.

Z. K. *Appeal dismissed.*

(6) 61 Ind. Cas. 70; 23 Bom. L. R. 325 at p. 333; 45 B. 955.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 164 OF 1924.

February 12, 1925.

Present:—Mr. Justice Carr and Mr. Justice Brown.

N. N. S. CHETTY FIRM—APPELLANTS

versus

THE BAILIFF OF DISTRICT COURT AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 20, 54, 56—Receiver, appointment of, in respect of portion of property, validity of—Transfer by insolvent—Receiver, whether can remove transferee from possession.

Where a Receiver is appointed under s. 50 of the Provincial Insolvency Act, the appointment should not be in respect of a part of the insolvent's property only.

Where an insolvent has transferred his property in such a way that the transfer can be annulled by the Court under s. 54 of the Provincial Insolvency Act, a Receiver appointed under the provisions of the Act would have no authority as against the transferee and would have no power to remove him from the possession or custody of the property transferred to him until the transfer has been annulled.

Appeal against the decree of the District Court, Pyapon, in C. M. No. 16 of 1924.

Mr. *Aiyangar*, for the Appellants.

Mr. *Villa*, for the Respondents.

JUDGMENT.—One Maung Pu applied in the District Court of Pyapon to be adjudicated insolvent. While his application was pending a petition was filed by N. S. A. R. Ramaswamy Pillai setting forth that shortly before filing of the application Maung Pu had executed a registered sale-deed whereby he purported to sell a house and compound to the present appellant and asking that if Maung Pu were adjudicated an insolvent an enquiry should be held as to the genuineness of the sale. No orders appear to have been passed on this application, but when Maung Pu was subsequently adjudicated an insolvent, the Court passed the following order:—"Bailiff of the Cour is appointed Receiver in respect of the pro

perties sold by Maung Pu to N. N. S. Sithambaram Chetty of Dedaye." This order was subsequently cancelled and the Deputy Bailiff of Dedaye was appointed Receiver of the "property of the said insolvent that has been sold to N. N. S. Sithambaram Chetty by Maung Pu under a registered document on the 18th June, 1924." The present appeal is filed against the original order appointing the Bailiff of the District Court as Receiver. The order was not made under the provisions of s. 20 of the Insolvency Act but under s. 56, and should not have been for Receiver of part only. Further, it is clear that the form taken by the order of appointment was apt to be very misleading and it is alleged that the Deputy Bailiff has heen receiving rents from the tenants of the property by virtue of such order. The order obviously can give him no power whatsoever as against the present appellant and if he is collecting rent he is doing so at his own risk. It may be that under the provisions of s. 51 of the Insolvency Act the insolvent has transferred his property in such a way that the transfer could be annulled by the Court, but until the transfer has been annulled the Receiver has clearly no authority as against the appellant. Section 56 (3) of the Act clearly sets forth that the Court has no power to remove from the possession or custody of property any person whom the insolvent has not a present right to remove. If the order of appointment were rightly interpreted it could do no harm to the appellant, but it appears likely that if it be allowed to stand, the Receiver may assume to himself powers to which he clearly has no right. It is desirable, therefore, that the order should be set aside. We set aside the order by the District Court and direct instead that the Deputy Bailiff of Dedaye be appointed Receiver for the property of the insolvent. If any creditor wishes action to be taken as regards the house and site in dispute, he should apply to the Court to take action under the provisions of s. 54. We pass no orders as to the costs of this appeal.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 1 OF 1924.

February 10, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

HANMANT SUBBAYA NAIK—

DEFENDANT—APPELLANT

versus

KRISHNA MANJUNATHYAJI—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 141, 144—Hindu Law—Alienation by widow—Adoption—Suit by adopted son to challenge alienation—Limitation.

A Hindu widow alienated certain property which formed part of her husband's estate in 1903. In the same year she adopted a son who died in 1914 while still a minor. In 1915 she adopted the plaintiff who brought a suit in 1922 to recover possession of the property alienated by the widow:

Held, that the plaintiff acquired by virtue of his adoption an inherent right to question any alienation by his adoptive mother made before his adoption and that the fact that there had been a previously adopted son who had died in the meantime did not in any way affect the plaintiff's right inasmuch as the plaintiff did not succeed to and was not a representative of the first adopted son and that consequently, the plaintiff's suit was within limitation. [p. 63, col. 2.]

Appeal from an order of the District Judge at Karwar, in Appeal No. 14 of 1923, reversing that of the Subordinate Judge at Honawar, in Civil Suit No. 32 of 1922.

Messrs. *S. S. Patkar* and *D. R. Manerikar*, for the Appellant.

Mr. *Jayakar* (with him Mr. *G. P. Murdeshwar*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover possession of the suit property with past mesne profits. He had been adopted by one Venkamma on May 26, 1915. On April 25, 1903, Venkamma had given the suit property on Mulgeni to one Manjunath. On April 30, 1903, she adopted one Ramakrishna born on June 14, 1900. On December 17, 1914, Ramkrishna died a minor. The present suit was brought on February 7, 1922. The lower Court dismissed the suit as time-barred.

In first appeal it was contended that Venkamma could only adopt to her deceased husband, that the second adopted son was in no way the representative of the first adopted son and, therefore, the cause of action accrued on the date of his adoption. On the other hand the defendant argued that the second adopted son was the representative of the first adopted son and, therefore, the suit was time-barred. The District Judge held that by his adoption, plaintiff obtained the right to question his adoptive

mother's alienations and that it was in virtue of his adoption an inherent right, and no valid ground had been shown for holding that the right had been barred. Accordingly the order of the lower Court was reversed and the suit was sent back to be tried on the merits. The defendant has appealed.

There is no direct authority for the point arising in this appeal. We have been referred to the case of *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (1). A Hindu widow succeeded to the estate of her adopted son on his death as his heir. She then alienated the suit property and subsequently adopted another son. It was held that a subsequent adoption could not divest the alienee of his rights under the alienation previously effected. Jackson, J., relied upon the decision of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (2) in deciding that the subsequent adoption of another son by the widow could not divest the alienee of his rights under the alienation made by her before adoption. But that case does not seem to be an authority for that proposition. The head-note runs thus:—

"In the year 1811, *G*, being childless, executed a deed of...permission by which he gave power to his wife, *C*, to adopt a son. He afterwards had a son, *B*, by his wife, *C*. In 1819, two years after his son's birth, and while he was living, *G* executed [another instrument giving the widow, his wife, permission to adopt]...*B*, on coming of age, succeeded to the ancestral and other estate of his father who had died. On B's death, childless, his widow succeeded as heir to her deceased husband, taking a vested estate in the whole of his estate. Some time after *B's* death, *C*, his mother, exercised the power given her by the instrument of 1819, by adopting a son to *G*."

It was held that "*B*, the son was the last full owner, and his wife succeeded at his death, as his heir to her widow's estate, and conseqnently, that the adoption by *C*, under the...[instrument] was void, as the power was incapable of execution."

There does not appear to have been any contest between an adopted son and an alienee from the widow before adoption. The Calcutta Court seemed to consider, on the authority provided by that decision, that the suit was time-barred because it ought to have been brought within three years from the date of the death of the first adopted son, although the alienation had been made after the first adopted son had died and while the widow was his heiress. This case is referred to by Mayne in his 'Treatise on Hindu Law and Usage, 9th Edition, at page 270 in the following passage:

"A widow adopted a son under the authority of her husband. She succeeded him as his heir, and made an alienation, and then adopted another son. The Court held that the alienation was good as against the second adopted son [*Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (1)]. The decision was given without any inquiry as to the propriety of the alienation, and was rested on the authority of *Chandrabulla's case* (2). It does not seem to have occurred to the Court that a mother had no more than a limited estate, which, upon the authority of the case cited, was devested by the adoption. The son then came in for all rights which had not been lawfully disposed of, or barred, during the continuance of that estate.....It may now be considered as settled law, *first*, that if a widow exceeds the powers conferred upon her by law, her acts in so far as they are in excess of those powers can be set aside by a subsequently adopted son as from the date of his adoption, *secondly*, that as the adoption immediately devests the widow's estate, it equally devests the estate of any one claiming under a title derived from her."

The question really then in this case is whether the plaintiff acquired by virtue of his adoption, an inherent right to question any alienation by his adoptive mother before his adoption, and it does not seem to me that the fact that there had been a previously adopted son could in any way affect that right. The second adopted son did not succeed to the first adopted son. Whether the mother as widow of the original holder made the alienation before the first adoption while she held a widow's estate, or after the death of the first adopted son, when she would be holding as his heir, would make no difference to the rights of the second adopted son to question her alienation. We think, therefore, that the District Judge was right in holding that the plaintiff was not the representative of the first adopted son, and that the suit was not barred by limitation. The appeal, therefore, must be dismissed with costs.

(1) 24 W. R. 183.
(2) 10 M. I. A. 279; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

Coyajee, J.—I am of the same opinion.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 148 OF 1924.

July 10, 1925.

Present:—Mr. Simpson, A. J. C.

Munshi BISHUN NARAIN BHARGAVA —PLAINTIFF—APPLICANT

versus

Qazi ABDUL MANAN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 8—Date fixed for issues—Plaintiff, failure of, to appear—Service on defendants not complete—Dismissal of suit for default, legality of—Duty of parties.

It is for the parties and their Pleaders, if they are duly notified of the date of hearing, to appear on that date and if they make a mistake as to the date fixed they must take the consequences.

Where a suit is fixed for issues for a certain date and the plaintiff fails to appear on that date, the Court has power to dismiss the suit under r. 8 of O. IX of the C. P. C., in spite of the fact that service has not yet been completed upon all the defendants.

Application for revision against the decree of the First Subordinate Judge, Gonda, dated the 8th May 1924, confirming that of the Munsif, Utraula, dated the 3rd November 1923.

Mr. *Ishwari Prasad*, for the Applicant.

Mr. *Mohammad Ayub*, for the Opposite Party.

JUDGMENT.—This is an application for revision under s. 115 of the C. P. C. The applicant was plaintiff in a suit in the Court of the Munsif. On the 27th September 1923 the order-sheet shows that plaintiff's Pleader and defendant No. 5 were present while the other defendants were absent. The guardian whom the plaintiff had proposed for defendant No. 2 who is a minor had been served but was not present. The plaintiff was directed to propose another guardian of defendant No. 2 to be appointed and 27th of October was fixed for issues. In the meantime on the 28th September B. Sri Ram Vakil was appointed guardian of defendant No. 2 and notice was issued to him and to the minor. On the 27th of October the plaintiff's Pleader and defendant No. 5 were present as before and so also was defendant No. 4, the father of defendant No. 2 who had originally been proposed by the plaintiff as guardian of defendant No. 2. He applied to be appointed guardian and plaintiff's Pleader did not object. As the notice to the minor had not been returned the case was adjourned to the 3rd of November 1923. On the 3rd of November the plaintiff and his Pleader were both absent. Defendants Nos. 1, 5 and 11 were present. They denied the plaintiff's claim. The plaintiff's suit was accordingly dismissed under O. IX, r. 8. The plaintiff then applied to have his suit restored. He stated that he did not get information of the date fixed. He said that he lives at Lucknow and that his Pleader gave him no information of the hearing because he was under the impression that the date fixed was not the 3rd of November but 26th of November. This application was dismissed and surely very properly. It is for the party and his Pleader, if they are duly notified for a day, to appear on that day and, if they make a mistake as to the date fixed, they must take the consequences. The applicant then appealed to the District Judge and his appeal was dismissed. He now comes here in revision and he takes the point which he did not take in either of the Courts below, which is, that his suit ought not to have been dismissed on a date which was fixed merely in order to have the notice on the minor returned served. But in fact the 27th October had been fixed for issues. Consequently the next date fixed, the 3rd November, was also for issues.

It is also argued that in no case can the plaintiff's case be dismissed unless the suit is ready for hearing. If there is any such matter as service still pending, there can be no dismissal of the case under O. IX, r. 1. No ruling is cited by the learned Counsel and I know no proposition of law to support that view. There seems no necessity to use the revisional powers of the Court in this case.

The application is, therefore, rejected.

Z. K. *Application rejected.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 256 OF 1924.
February 28, 1925.
Present:—Mr. Baker, J. C.

MAROTI AND ANOTHER—DEFENDANTS—APPLICANTS
versus
HUSSAIN MIYA—PLAINTIFF—NON-APPLICANT.

Contract Act (IX of 1872), s. 145—Suit against principal and surety—Decree against surety—Payment made by surety, whether recoverable from principal.

Where a suit based on a mortgage is dismissed against the principal but a money-decree is passed against the surety and the latter satisfies the decree he can maintain a suit against the former to recover the amount paid by him. The case is governed by s. 145 of the Contract Act, and the surety's payment under the decree against him being rightful, the amount of the payment is recoverable from the principal.

Application for revision of the decree of the Small Cause Court Judge, Nagpur, dated the 2nd July 1924, in Civil Suit No. 2027 of 1923.

Mr. *M. D. Khandekar*, for the Applicants.

Mr. *W. G. Joshi*, for the Non-Applicant.

ORDER.—One Gujya executed a mortgage to Lal Miya and the non-applicant Hussain Miya stood surety. The mortgagee brought a suit on the mortgage, which was dismissed as against the principal but a money-decree was passed against the surety. The decree was executed against the surety and he had to pay, so he brought a suit against the applicants who are the representatives of the mortgagor, Gujya. This was decreed.

The applicants apply in revision on the ground that as the suit was dismissed against them they are not bound by law to reimburse the surety.

Reference is made to *Thirumalai Savuri Naicker* v. *Royar* (1) and it is argued that the applicants are not joint judgment-debtors along with the surety.

The case is, however, governed by s. 145 of the Contract Act. The surety was bound to pay, there being a decree against him; his payment under the decree was rightful and he is entitled to recover from the principal debtor the sum he had to pay.

The application is dismissed with costs.

Z. K. *Application dismissed.*

(1) 62 Ind. Cas. 706; 40 M. L. J. 529; 13 L. W. 559; (1921) M. W. N. 334.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 46 OF 1923.
February 12, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

SURYAJIRAO GANPATRAO JAHAGIRDER—DEFENDANT—APPELLANT
versus
SIDHANATH DHONDDEO GARUD—PLAINTIFFS—RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), ss. 153, 217—Limitation Act (IX of 1908), Sch. I, Art. 62—Landlord and tenant—Grant of permanent tenancy at fixed rent—Demand of enhanced rent—Payment under protest—Suit to recover amount of enhanced rent illegally levied—Limitation, commencement of—Survey Settlement, introduction of, effect of—Landlord, whether entitled to enhanced rent.

Plaintiffs were defendant's tenants holding at a fixed rate of rent. Defendant's property was being managed by the Court of Wards and in 1912 the Collector on behalf of the Court of Wards served a notice upon the plaintiffs claiming a higher rent to be levied on the plaintiffs' land. In 1916 a notice was issued by the Collector under s. 153 of the Bombay Land Revenue Code claiming a certain sum as arrears from the plaintiffs and stating that if the arrears were not paid the Collector proposed to declare the holding forfeited. The plaintiffs paid the amount of the demand under protest and filed a suit in 1919 for a declaration that the defendant was not entitled to claim enhanced rent and to recover from the defendant the amount wrongfully recovered by the latter from the plaintiffs:

Held, (1) that the demand made by the Collector from the plaintiffs was made by him on behalf of the defendant's estate and that the Government was not concerned with the recovery of the demand from the plaintiffs and was not, therefore, a necessary party to the suit; [p. 66, col. 1.]

(2) that limitation for the suit began to run from the date of the payment made by the plaintiffs under protest and that the suit was within time. [*ibid.*]

Where before the introduction of a Survey Settlement into an alienated village, the alienee has entered into a contract with certain tenants granting them fixity of tenure and fixity of rent, the subsequent introduction of the Survey Settlement into the village cannot enable the alienee to avoid his contractual liability and to enforce against his permanent tenants the payment of assessment levied on occupancy land. [p. 66, col. 2; p. 67, col. 1.]

Appeal from the decision of the First Class Subordinate Judge at Jalgaon, in Special Suit No 431 of 1920.

Mr. *G. N. Thakor* (with him Mr. *D. C. Virkar*), for the Appellant.

Mr. *K. H. Kelkar*, for the Respondents.

JUDGMENT.—The plaintiffs sued to obtain a declaration that the defendant was not entitled to claim more than Rs. 87-9-11 per year fixed by the original agreement, and to recover from the defendant Rs. 2,649-12-4 wrongfully recovered by the

defendant with interest thereon and further interest till realization, and for a permanent injunction to the defendant restraining him from demanding more than Rs. 87-9-11 per year.

The plaintiffs' title depended upon two documents, Exs. 74 and 75. Those documents, we think, gave the plaintiffs' predecessors-in title the right to hold the land mentioned therein as permanent tenants on payment of the rents fixed by those documents. In 1911 and 1912 the defendant's property was being managed by the Court of Wards, and a notice of demand was served upon the plaintiffs by the Collector on behalf of the Court of Wards claiming a higher rent or assessment to be levied on the plaintiffs' land. An objection was raised in 1914 by the Receiver of the plaintiffs' property claiming that the Court of Wards had no right to make such a demand, and threatening that a suit would be filed for a declaration restraining the Collector from making such a demand. Nothing further occurred until 1916. A notice was then issued by the Collector under s. 153 of the Land Revenue Code claiming the sums of Rs. 2,649 and Rs. 92-4-0 being the land revenue and local fund cess on plaintiffs' Survey numbers from the years 1911 to 1916 and giving notice that if the arrears were not paid the Collector proposed to declare the holding to be forfeited. The plaintiffs paid under protest and filed this suit on November 20, 1919.

The first issue raised was whether Government was a necessary party to the suit. We think that the Judge below was right in holding that this property was at the time of the notice under the superintendence of the Court of Wards, that the claim was not made by Government but by the Collector acting on behalf of the defendant's estate, that the Government was not concerned with the recovery of the demand from the plaintiffs, and that, therefore, Government was not a necessary party to this suit.

The findings on the 2nd and 3rd issues would follow that finding.

The next question is one of limitation. We think that the Judge was right in holding that time began to run from the date of the payment made by the plaintiffs under protest. It was contended that time began to run when the demand was first made. But although the fact that the demand for increased payment so made might have given rise to a cause of action to enable the plaintiffs to seek for a declaration that that particular demand was unauthorized, it would not affect their right to file the present suit in which the relief claimed was on a different cause of action arising from the payment under protest made by them on the demand under s. 153, Land Revenue Code.

The only question left then is whether the plaintiffs were permanent lessees of the defendant, and whether the rent was liable to be enhanced on the defendant's demand. We think it is beyond doubt that the letters Exs. 74 and 75 created permanent tenancies in favour of the plaintiffs' predecessors-in-title. At that time the village was unsurveyed and the effect of those documents was to create a permanent tenancy in favour of the plaintiffs' predecessors-in-title at the fixed rents mentioned therein. The defendant expressly agreed that no further demand would be made against the tenant beyond the amounts so fixed. It was contended that s. 217 of the Land Revenue Code, after the Survey had been introduced into this village, would affect the rights of the permanant tenants to avoid any enhancement of their rent. It is difficult to see how the provisions of s. 217 can affect contractual rights arising before the introduction of the Survey. It states :—

"When a Survey Settlement has been introduced, under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such Settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as holders of lands in unalienated villages have or are affected by, under the provisions of this Act, and all the provisions of this Act relating to holders of land in unalienated village shall be applicable, so far as may be, to them."

Now with regard to an unalienated village it would be competent to Government to enter into contractual relationship with tenants or occupants. They might acquire fixity of tenure and fixity of rent. In this case as the village had been alienated, the alienee had entered into a contract with the plaintiffs' predecessor-in-title granting not only fixity of tenure but also fixity of rent, and there is nothing in the provisions of s. 217 which would enable the alienees of the village to avoid

their contractual liability, so that they could enforce against their permanent tenants the payment of the assessment levied on occupancy land. We think then the plaintiffs had acquired rights as permanent tenants against the *inamdars* which were not affected by the introduction of the Survey into this village, and that they were entitled to the decree given to them by the Trial Court. The appeal then will be dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No 76 OF 1923.

March 9, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

BANSIDHAR—DEFENDANT—APPELLANT

versus

BEHARI LAL AND OTHERS—PLAINTIFFS, LACHMI NARAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage of family property—Necessity, absence of—Pious obligation to pay father's debts, effect of.

The mere circumstance of the pious obligation of a Hindu son to pay his father's debts does not validate a mortgage of family property by the father which is invalid for want of legal necessity or of necessity for the payment of an antecedent debt. [p. 68, col. 1.]

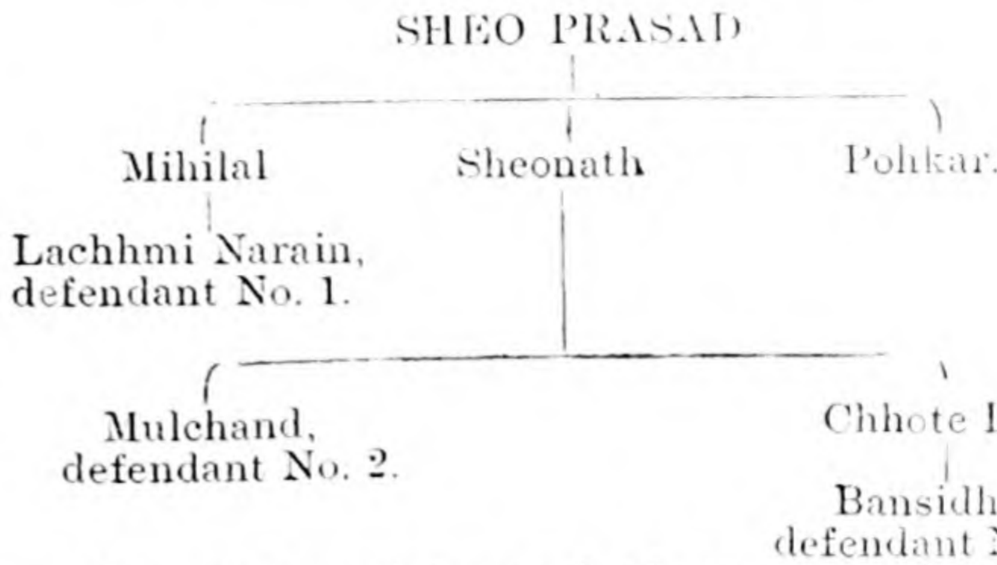
Ram Sarup Singh v. *Jageshar Singh*, 73 Ind. Cas. 466; 26 O. C. 341; 9 O. & A. L. R. 157; (1923) A. I. R. (O.) 150, *Gajadhar Bakhsh Singh* v. *Baijnath*, 79 Ind. Cas. 104; 27 O. C. 133; 10 O. & A. L. R. 264; 11 O. L. J. 264; (1925) A. I. R. O.) 9; 1 O. W. N. 60, followed.

Appeal against the judgment and decree of the Subordinate Judge, Hardoi, dated the 8th October 1923.

Mr. *Bisheshar Nath Srivastava*, for the Appellant.

Messrs. *Ram Prasad* and *Moti Lal Saksena*, for the Respondents.

JUDGMENT.—Plaintiffs mortgagees sued for possession as such on foot of a bond dated the 2nd June 1911. The bond was executed by the defendant Lachhmi Narain for himself and for his two minor nephews, Mulchand and Chhote Lal. Chhote Lal is now dead and the defendant No. 3 Bansidhar is his minor son. The following pedigree will indicate the relationship between the defendants:—



The only evidence before us is the mortgage-deed in suit printed in the Appendix. The detail of the consideration given therein is that the money was set off against the simple mortgage-deed executed by Sheonath and Pohkar dated and registered on the 27th February 1899 for Rs. 800 in favour of the mortgagees, the amount on 2nd June 1911 due thereon being Rs. 1,212, Rs. 13 is stated to have been received by the executant for stamp and cost of registration and the consideration of the deed was Rs. 1,225.

Pohkar died before the date of the mortgage in suit and so did Sheonath. It may be seen from the pedigree that Sheonath was father of the defendant Mulchand and grandfather of the defendant Bansidhar.

The judgment of the learned Subordinate Judge is confused. The defence by Mulchand and Bansidhar was that the property being ancestral and joint family property Lachhmi Narain had no authority to transfer it without legal necessity. The lower Court has observed: "The defendants are bound by the deed because it was for the antecedent debt. It was for legal necessity. The defendants have not pleaded that the antecedent debt was borrowed for illegal or immoral purposes."

There is no proof that the consideration of the deed in suit was borrowed for the payment of antecedent debt. We have no evidence that there was any antecedent debt. Sheonath did not execute the mortgage-deed in suit so it could not be said that he executed it for the payment of his antecedent debt. The deed was executed by Lachhmi Narain on behalf of Mulchand and there is no proof of any legal necessity. If a father executes a deed for the payment of a debt due from himself, it is said that he has transferred the property for the payment of an antecedent debt. No such circumstance arises here. The lower

Court has mixed up the payment of antecedent debt with legal necessity for the payment of a debt such as would bind members of the family other than the one who actually transferred the property.

The lower Court decreed the suit and Bansidhar has appealed. This appeal must succeed for reasons already given. It was held by a Bench of this Court in *Ram Sarup Singh* v. *Jageshar Singh* (1) that the mere circumstance of the pious obligation of Hindu son to pay the father's debt does not validate a mortgage which is invalid for want of legal necessity or of the necessity for the payment of antecedent debt. The same was held in another and a more recent Bench case of *Gajadhar Bakhsh Singh* v. *Baijnath* (2). One of us was a party to the first judgment and the other to the second judgment.

If the appeal had not succeeded on this point, we would have granted the defendants' prayer to redeem the property following the principles laid down by the Privy Council in *Mohammad Sher Khan* v. *Swami Dayal* (3). In doing so we would have reduced the exorbitant rate of interest which is also penal.

In the result we decree the appeal and dismiss the plaintiffs' suit with costs of both the Courts.

Z. K. *Appeal dismissed.*

(1) 73 Ind. Cas. 466; 26 O. C. 341; 9 O. & A. L. R. 157; (1923) A. I. R. (O.) 150.

(2) 79 Ind. Cas. 104; 27 O. C. 133; 10 O. & A. L. R. 264; 11 O. L. J. 264; (1925) A. I. R. (O.) 9; 1 O. W. N. 60.

(3) 66 Ind. Cas. 853; 25 O. C. 8; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; 44 A. 185; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79; 49 I. A. 60 (P. C.).

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 274 OF 1924.

February 13, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Coyajee.

ABDUL AZIZ SHEKH—PLAINTIFF—APPLICANT

versus

CHANDU SONU KHODKE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXII, rr. 4, 9, Sch. II, para 20—Application to file award—Death of defendant—Substitution, absence of—Abatement—Suit to enforce award, maintainability of—Validity of award, whether can be challenged—Res judicata.

An order that an application to file an award has abated owing to the legal representatives of the deceased defendant not having been brought upon the record within the prescribed period, is in the same category as an order refusing to file the award and neither of them operates as *res judicata* so as to bar a regular suit by the plaintiff to enforce the award.

A suit can be filed to enforce an award without the plaintiff first obtaining an order that the award shall be filed. In such a suit the validity of the award can be assailed by the defendant.

Application against an order of the Judge of the Court of Small Causes, Poona, in Suit No. 4241 of 1923.

Mr. *J. R. Gharpure*, for the Applicant.

Mr. *P. V. Kane*, for the Respondent.

JUDGMENT.—In *Rajmal Girdharlal* v. *Maruti Shivram* (1), it was held that when a party to an award sought to file it in Court under para. 20 of the Second Schedule of the C. P. C, and the Court refused to file it, such refusal would not operate as a bar of *res judicata* if the party filed a regular suit thereafter to enforce the award. In this case the applicant sought to file an award passed in his favour dated September 17, 1918. The application was registered as a suit. But thereafter the defendant died and his legal representatives were not brought on the record within the prescribed period. An order for abatement was then passed. The applicant then brought a suit in the First Class Subordinate Judge's Court to recover the money under the award, but the plaint was returned by the Joint Subordinate Judge as being beyond his jurisdiction and was presented to the Small Cause Court. The plaintiff, however, thought he would prefer an appeal to the District Judge against the decision of the Joint Judge returning the plaint. So he got back his plaint, but he lost the appeal, and again presented the plaint to the Small Cause Court. The Judge considered that the suit was barred under O. XXII, r. 9, considering that the decision in *Rajmal Girdharlal* v. *Maruti Shivram* (1) was not applicable, and that although an order rejecting an application to file an award would not be considered as a decree, yet an order of abatement in a similar proceeding would bar a regular suit being filed to enforce the award. We cannot

(1) 59 Ind. Cas. 755; 45 B. 329; 22 Bom. L. R. 1377.

see any difference between the two. An order that an application to file an award abates is in the same category as an order refusing to file an award. So neither order can operate as *res judicata*. We further think that the Judge was wrong in holding that the suit was not maintainable because the plaintiff ought to have adopted a different procedure after the District Court had confirmed the order of the Subordinate Judge. He would be entitled, in any event, after his plaint was returned to him, to file it again in the same Court, subject to any bar there might be of limitation. The Judge also thought that the suit was misconceived as the plaintiff was trying to recover the amount awarded without a decree on the award, and the question whether the award was validly passed or not could not be tried in such a suit. But a suit can be filed to enforce an award without the plaintiff first obtaining an order that the award itself shall be filed. In such a suit there does not appear any reason why the validity of the award could not be assailed. We make the Rule absolute and direct that the suit should be heard on its merits by the Small Cause Court Judge. Costs to be costs in the cause.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 37, 41 AND 53 OF 1923.

March 25, 1925.

Present :—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Rai Bahadur Babu MOHAN LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sheikh MOHAMMAD ADIL —PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 29, 30, 31, 50 (j)—Evidence Act (I of 1872), s. 35—Certificate of guardianship, whether public document—Entry in certificate, whether relevant—Sale of minor's property—Sanction of Court—Enquiry, absence of, effect of—Sanction, validity of—Fraud by purchaser, effect of—Person in fiduciary position, whether can purchase minor's property—Limitation Act (IX of 1908), Sch. I, Arts. 44, 144—Suit by minor to recover property alienated by guardian—Transfer by transferee—Limitation.

In the Provinces of Oudh a District Judge is bound by law to prepare a certificate of guardianship under rules framed by the Judicial Commissioner's Court under s. 50 (*j*) of the Guardians and Wards Act. Such a certificate is a public document made by a public servant in the discharge of his official duty and falls within the purview of s. 35 of the Evidence Act. An entry in such a certificate with regard to the age of the minor is a relevant fact. [p. 71, col. 2.]

Under s. 31 of the Guardians and Wards Act an order granting permission to a guardian to sell property belonging to the minor must recite the necessity for the sale and describe the property with respect to which the act permitted is to be done, and this order must be recorded, dated and signed by the Judge with his own hand. [p. 75, col. 2.]

The word "approved" with the initials of the Judge on a draft of a sale-deed relating to the property of a minor does not amount to a permission for the sale under s. 31 of the Guardians and Wards Act. [*ibid.*]

Once a sale of property belonging to a minor is proved to have been effected by the certificated guardian of the minor without the permission of the Court it becomes voidable without any enquiry whether the terms of the transfer were favourable to the minor or not. [p. 76, cols. 1 & 2.]

Where in connection with the sanction of a sale of property belonging to a minor by his guardian an under-hand dealing is brought home to the purchaser, the formal sanction of the Court will not be sufficient to validate the sale. [p. 77, col. 2.]

Under s. 31 of the Guardians and Wards Act the Court obtains jurisdiction to sanction a sale of the minor's property only when it makes a proper enquiry as to the necessity and advantage of the sale. An enquiry must be made with regard to all the points mentioned in cl. (2) of the section. An order granting sanction without making any enquiry is made without jurisdiction and is a nullity. [p. 80, cols. 1 & 2.]

A suit by a quondam minor to recover property obtained by the defendant from a person who was a transferee of it from the certificated guardian of the minor is governed by Art. 144 and not by Art. 44 of Sch. I to the Limitation Act. [p. 81, col. 1.]

Per *Wazir Hassan, A. J. C.*—Fraud is infinite in variety; sometimes it is audacious and unblushing, sometimes it pays a sort of homage to virtue, and then it is modest and retiring, it would be honesty itself if it could only afford it. But fraud is fraud all the same, and it is the fraud, not the manner of it, which calls for the interposition of the Court. [p. 84, col. 2.]

A person in a fiduciary position cannot be allowed to make any advantage out of his position and the Court will not allow a person to be placed in a position in which his interest will pull him one way and his duty the other. [p. 86, col. 1.]

Appeals against a decree of the Subordinate Judge, Hardoi, dated the 17th of May 1923.

Mr. *G. N. Misra*, for the Appellant.

Messrs. *M. Wasim* and *Ali Mohammad*, for Respondent No. 1.

JUDGMENT.

Dalal, A. J. C.—One Mohammad Ameer, *Taluqdar* of Gopamau, had three sons Mohammad Kamil, Mohammad Akil and Mohammad Fazil. On the death of Mohammad Kamil in 1909 his widow *Musammat* Maryam-un-nissa was appointed guardian of her three minor sons, Moham-

mad Amil, Mohammad Adil and Mohammad Kabil. The plaintiff of these suits was Mohammad Adil. He sued on 15th June 1921 for the possession of one-third share in certain properties of his father which he alleged had been wrongly transferred to the contesting defendants. One suit was brought against two transferees, Babu Mohan Lal, a Pleader of Hardoi, and his cousin Ajodhiya Prashad who are members of a joint Hindu family and represent the entire Hindu family of six persons. This was Suit No. 124 of 1921. The other suit was instituted on the same day of which the contesting defendant was the plaintiff's uncle Mohammad Akil to whom certain other properties were transferred. The plaintiff's mother *Musammat* Maryam-un-nissa was a defendant in both suits; she, however, took no interest in the litigation.

The plaintiff objected to two transfers made by his mother on his behalf with the alleged sanction of the District Judge of Hardoi. One sale-deed, that executed in favour of Mohan Lal, was executed on 19th August 1915 and the other in favour of the plaintiff's uncle the following day on 20th August 1915. In both suits the plaintiff asked for possession of his share of the property transferred by the guardian mother.

Both suits were decreed by the Subordinate Judge of Hardoi on payment by the plaintiff of his share of the sale consideration in each case.

There are before us two Appeals Nos. 37 and 41 of 1923 by Babu Mohan Lal and Mohammad Akil respectively and a third No. 53 of 1923 by the plaintiff Mohammad Adil against Babu Mohan Lal on the ground that he should not be ordered to make any payment to the defendant as a condition precedent for recovering possession. The plaintiff has not appealed against the order for the payment of his share of the sale consideration to his uncle Mohammad Akil.

The first ground of appeal that the suit was time-barred is easily disposed of. In the plaint the plaintiff declared that his cause of action arose on the 15th June 1918 when he attained majority, that is, the age of 21, as the District Judge had appointed a certificated guardian for him. The suit was brought within three years of that date, on 15th June 1921. Subsequently the plaintiff foolishly had the plaint of the suit against his uncle amended so as to make out that the cause of action arose on 15th June 1921. His explanation was that he mistook at first the age of majority to be 18 not knowing that it was 21 for a person for whom a certificated guardian was appointed. The reason for the alteration obviously was that his uncle, the defendant, disclosed names of certain transferees in the written statement and as against them, who were subsequently served with summonses the suit as brought would be time-barred. It is to be regretted that the plaintiff was so badly advised as to tell a number of lies in order to save what his advisers thought would be a bar of limitation as against the transferees of Mohammad Akil. It is not worthwhile examining school registers and other evidence produced by the plaintiff to prove that he was born on 15th June 1900 and not on 15th June 1897 as held by the lower Court.

The elaborate accounts kept for the plaintiff's family conclusively prove that he was born in 1897. We have examined the accounts and are satisfied that they are not forgeries. The plaintiff stated his age at the heading of both plaints to be 25 so no scope is left for him to say that he gave the cause of action 15th June 1918 as the date of his attaining the age of 18 and not of 21.

The appeals have been consolidated and with six books in front of us, the hearing of the appeal has involved as much manual dexterity as mental agility. The office should discover some better plan so that only one book may be in front of us in two parts, with pages in each part running serially. Reference then would be easy to the pages of one printed record instead of to pages of six separate records. One Appendix is stitched to its parent book while the other two are not, a remarkable feat of the office to make the riddle of reference still more difficult. If the record has to be sent to the Privy Council, the two books shall be separated and on every book the following letters shall be written in large capitals in red ink:—

Appeal No. 37 of Mohan Lal	X
Appendix to it	XX
Appeal No. 41 of Mohammad Akil	Y
Appendix to it	YY
Appeal No. 53 of Mohammad Adil	Z
Appendix to it	ZZ

This will not remove the difficulty of reference but will lessen it to some extent. In this judgment, I shall give reference according to the above, for instance, X-5 meaning page 5 of Book X, either in Part I or Part III according as the reference is to a statement of a witness or to a proceeding or it is to an exhibit.

In the account-book under date 13th June 1897 is the entry (Exs. B-55 Y-38).

Fruits on the date of birth of a son of Mohammad Kamil, Rs. 2-10-0.

This son must be the plaintiff because under date 10th November 1897, we find his name mentioned and the presents received at the time of his *aqiqa* ceremony entered (Exs. B-56 Y-13).

Income from presents in connection with the *aqiqa* ceremony of Mohammad Adil, Rs. 32.

We agree with the reasoning of the learned Judge of the lower Court that the entry of the expenses on the date of birth fixes the month and year of birth and not the date. The account was not kept up from day to day. Prior to 13th June 1897 the date of the account is 10th June and subsequent to it 24th June. If a man sits down to write up accounts some days after they are incurred he may easily make a mistake as to dates. Suppose the writer of the account book sat down on the 19th to write up the expenses incurred within a week preceding in connection with the birth of a son to his master, he may easily make the mistake of putting down 13th instead of 15th. This confusion will be easily understood by people who sit down to write a week's diary at one time. The events are remembered but what happened on the different days is difficult to bring back to memory. An event of a Friday may easily be recorded under Wednesday through lapse of memory in connecting events with dates. The writer of the account, Mohammad Saeed, himself has stated that the date is not correct as to the day of the month. Argument was addressed to us to prove that he was an unreliable witness but his statement on this point is natural and in accordance with human experience so we believe him in this matter as did the lower Court.

The lower Court has relied for the date of the month on the guardianship certificate. The genuineness of this certificate, a copy of which was produced by the plaintiff, was admitted by the defence (Ex. 6-ZZII). This certificate was prepared in the office of the District Judge of Hardoi and signed by the then incumbent of the office as required by rules framed by this Court under s. 50 (*j*) of the Guardians and Wards Act (See para. 258 of the Oudh Civil Digest). The certificate is a public document made by a public servant in the discharge of his official duty. It is, therefore, a record such as is mentioned under s. 35 of the Evidence Act and an entry therein is relevant fact.

The learned Counsel for the appellant referred us to a Bench ruling of the Calcutta High Court in the case of *Satis Chunder Mukhopadhya* v. *Mahendro Lal Pathuk* (1) where the Judges held under the previous Act of Guardians and Wards (XL of 1858) that a certificate of guardianship is no evidence of majority under s. 35 of the Evidence Act being neither a book nor a register nor a record kept by any officer in accordance with any law. The report, however, does not state whether there was any rule framed by the High Court under authority vested in it by law for the preparation of such a certificate. In the Province of Oudh a District Judge is bound by law to prepare a certificate of guardianship so, in my opinion, the ruling is not applicable to this Province.

It was questioned why the mother of the plaintiff was not produced as a witness to depose to the age stated by her in her application made under s. 10 of the Guardians and Wards Act. The answer would be that a Muhammadan lady would not be likely to remember dates of births and the statement made by her in the application must have been made on information received by her, most probably from the defendant, Mohammad Akil, who was the manager (*sarbarahkar*) of the property of the minors.

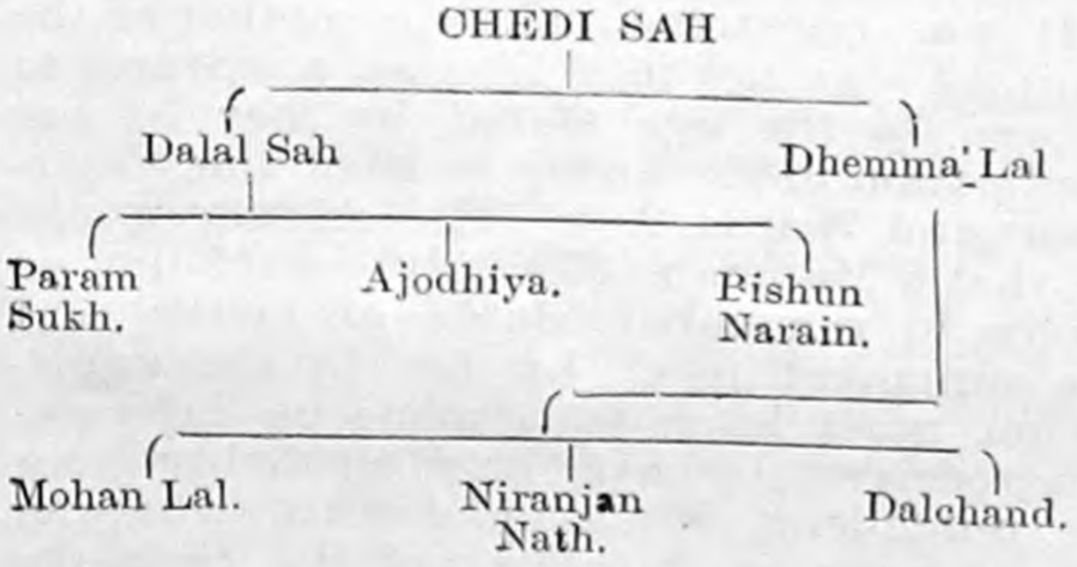
I uphold the finding of the lower Court that the plaintiff was born on 15th June 1897. His suit was, therefore, within time against Mohammad Akil and Mohan Lal. I shall discuss later the question of limitation so far as the defendant Waris-uzzamman is concerned. This defendant is a son and transferee of Mohammad Akil and was not made a party to the suit until the 10th of January 1922. If the limitation of Art. 44 applies the suit as against him would be time-barred in ac-

(1) 17 C. 849; 8 Ind. Dec. (N. S.) 1110.

cordance with the provisions of s. 22 of the Limitation Act. On behalf of the respondent it was argued that the provisions of Art. 144 will apply because the transaction was void by reason of fraud. This matter may be considered after the facts of the case and the deductions to be drawn therefrom are discussed.

A narrative of events leading up to the District Judge's sanction which forms the main stay of the defence may be set out. A clear story of the sequence of events is often more illuminating than a series of arguments.

The sales which are impugned are of the village of Baghauli in favour of Mohan Lal (Ex. B-13 Y 161) and of small areas in villages Akohra, Balalpur, Sirsa, Faqirabad and Niamatnagar in favour of Mohammad Akil (Ex. B-12 Y-171). The deed in favour of Mohan Lal and Ajodhiya Prashad was executed by the guardian of the minors (plaintiff and his two brothers) on 19th August 1915 and the other by the same lady next day on 20th August 1915. Mohan Lal is a member of a Hindu joint family. The following is the pedigree :—



Mohan Lal, his two brothers and three cousins are the present surviving members of the joint family.

Mohammad Kamil, the father of the minors had, during his lifetime, mortgaged his 10½ annas share of village Baghauli including half the Bazar of Kamilganj and 8 *biswas* share of village Gadanpur to Ajodhiya Prashad and Niranjan Nath (representing the joint family mentioned above) on 31st January 1905 (Ex. B-26 X-30). Subsequently there was a deed of further charge executed by the same Mohammad Kamil in favour of the same mortgagees on 8th December 1906 (Ex. B-27 X-64). Interest on the two bonds was made payable at different rates but subsequently under an agreement the same rate of interest was agreed upon for both the amounts advanced to Mohammad Kamil. The rate of interest was 0-10-8 per cent. per month with six monthly rests. It may be mentioned that the first deed which carried a lower rate of interest was for a large amount of Rs. 40,000 while the second which for a time carried a higher rate of interest was for a comparatively small amount of Rs. 2,400. It is necessary to mention this fact because much play was made of the agreement to reduce the rate of interest on the second mortgage-deed as indicating the generosity of Mohan Lal towards the minors.

On 23rd February 1911 two persons Imtiaz Husain and Jumna Prashed brought a suit for sale of 5 *biswas* of village Baghauli on foot of their mortgage (plaint Exs. B-21 X-83). The defendants to this suit were Mohammad Akil, *Musammat* Maryamunnissa, mother of the minors, the three minors under the guardianship of their mother and Mohammad Fazil, all representing the mortgagors and Ajodhiya Prashad and Niranjan Nath subsequent mortgagees. In that suit Babu Mohan Lal was Pleader for Mohammad Akil, for the minor's mother (presumeably including the minors) and for Ajudhiya Prashad and Niranjan Nath (*vide* decree Exs. B-24 X-92). The defence put forward on behalf of Mohammad Akil and the minors' mother was that this debt was payable by Mohammad Fazil alone (See written statement B-22 XX-9, paras. 7 and 8). The plaintiffs and the defendants Mohammad Akil and the minors compromised (Exs. B-122 X-87) but a judgment was recorded by the Civil Court because the other defendants had not joined in the compromise. The Court held that the plaintiffs who were mortgagees cannot be bound by a partition between the mortgagors and so all the mortgagors and not Mohammad Fazil alone who was made liable to pay this debt at the time of partition would be liable under the decree.

This decree was made absolute on 28th October 1911 (B-25 X 96). It was for a sum of Rs. 14,465-15-0. The amount was paid off by Ajudhiya Prashad and Niranjan Nath on 21st May 1912 (Receipt Exs. B-90 X-61).

It may be noted that the mortgage-deed in favour of Imtiaz Husain and Jumna Prashad was dated 9th July 1903 and a year's time was given in the deed for payment of the mortgage-money. A suit on that deed would, therefore, be time-barred on 8th July 1916. There was another decree—that in favour of Bishan Narain against the minors. The suit was instituted by Bishan Narain on 5th April 1910 after the death of Kamil (Plaint Exs. B-60 X-70). Here also the defence was made that by an agreement the debt was made payable by Mohammad Fazil alone. The Civil Court stated in its judgment (Ex. B-61 X-74) that this point was not proved. A joint decree was passed against Mohammad Akil, Mohammad Fazil and the minors under the guardianship of their mother on 25th June 1910 (Exs. B-62 X-80). Baghauli and Gadanpur were not included in the properties to be sold under this decree.

The mortgaged property was not sufficient for the satisfaction of the decree and the decree-holder obtained a money-decree under O. XXXIV, r. 6 and the villages of Baghauli and Gadanpur were proclaimed for sale for the recovery of Rs, 15,039 and odd (XX-12). The date of the decree was 7th February 1914 and the proposal for sale was sanctioned by Government on 6th April 1915.

The date fixed for the sale of the two properties was 21st June 1915. On 19th June 1915 the minor's mother applied for postponement of sale but the application was refused by the sale officer (Exs. B-2 and B-3 Y-144 and 146).

Mohammad Akil then applied to the Deputy Commissioner of Hardoi under whom the sale officer worked for postponement of the date of sale; this was on 21st June 1915 (Exs. B-4 Y-147). It was stated therein that the minors, Mohammad Amil and others had reached a settlement with Babu Mohan Lal Vakil and only the sanction of the District Judge was wanting and that on such sanction being obtained arrangement will be made for the payment of Bishen Narain's decree. The Deputy Commissioner directed the sale officer to postpone the sale for two months if the decree-holder agreed (Exs. B-5 Y-149). The decree-holder agreed on condition that the sale may take place on 20th August 1915 without the issue of any other sale notification and the sale was postponed on that condition (Exs. B-6 and B-7 Y-150 and 152).

On 22nd June 1915 the guardian *Musammat* Maryam-un-nissa applied to the District Judge for sanction to sell the minors' property as required by s. 29 of the Guardians and Wards Act (Exs. 10 Y-157). This application is of considerable importance and may be quoted below in full. It has three parts. First consisting of the narration of events, second giving the schedule of debts due from the minors and the third giving a list of the properties of which sale was desired.

PART I.

It is submitted that Pandit Bishen Narain Vakil's one decree, valued at Rs. 16,243-12-5 is under execution and the entire villages of Baghauli and Gadanpur having been attached, stand proclaimed for sale. In the said villages, the minors own $10\frac{1}{2}$ annas in Baghauli and 8 annas in village Gadanpur. 21st June 1915 was the date of sale. The whole property is being sold. It was, with great difficulty, that, with the permission of the Deputy Commissioner, time for two months has been allowed on condition that the property would be sold on 20th August 1915 without issuing any notice. Therefore, the 20th August 1915 has now been fixed for sale.

As per attached schedule, the minors, upto 21st June 1915 owe a debt of one lac, principal with interest, and the income from the minors' property cannot suffice to cover even the interest thereof. If some suitable arrangement is not very early made, the interest shall increase day by day and the whole property of the minors shall be wasted. Besides this, the tenants have paid about Rs. 4,000 in advance. Now there seems to be no other alternative left save to sell a considerable, *i.e.*, the greater part of the property, for the payment of debt. A transaction is being negotiated with several Bankers and many of whom are even ready. The petitioner is *parda nashin*.

On the 18th June 1915 the applicant applied to this Court for selling miscellaneous *pattis*, and in connection therewith, the *patwaris* have been summoned.

Now, through this application, it is prayed that the permission for selling the shares in villages Baghauli, Mughlipur, Faqirabad, Niamat Nagar, Sirsa and Bilalpur, District Hardoi, and Akohra, District

Sitapur be granted in this way that the applicant having settled the transaction, through Azizul Haque, her general agent with the Bankers, the purchasers should submit the draft to you for sanction and relieve the minors of their debts, after the sanction of the draft and the settlement of the sale-deed; so that the rest of the property may be saved for the maintenance of the minors; out of the debts brought to the notice of the Court, there was a deed too in favour of Ajodhiya Prashad and Niranjan Nath, the time for which shall expire on 3rd July 1915 and so it would be incumbent upon him to institute a claim for the whole debt. On account of such institution, the minors shall be put to an additional liability for 6 or 7 thousands rupees.

Therefore, it is prayed with due respect that permission to settle the sale transaction through the general agent, Saiyid Azizul Haque, be given very soon.

PART II.

Schedule of the debts due to the Bankers from Hafiz Mohammad Amil, Mohammad Akil and Mohammad Adil, minor sons of Mohammad Kamil.

	Rs.	a.	p.
Under the bigger deed, upto 21st June 1915, the principal and interest ...	88,721	14	3
Deed of further charge with interest, etc., upto 21st June 1918 ...	1,379	5	3
Out of the debt and Imtiaz Husain's decree to the extent of the minors' share with interest from 21st June ...	11,738	4	2
Total debt due to Ajodhiya Prashad and Niranjan Nath ...	1,01,834	7	8
	(sic)		
Pandit Bishun Narain Vakil's decree-money to the extent of half of the decree, together with interest upto 21st June 1915 ...	8,121	14	2
Total ...	1,09,956	5	10
Advance money recovered from several tenants about ...	4,000	0	0
Total ...	1,13,956	5	10

PART III.

List of the property for the sale whereof permission is solicited.

Nature of *Haqiat.*	Extent of *Haqiat.*	Gross rental.	Revenue.	Net profits.
		Rs. a. p.	Rs. a. p.	Rs. a. p.
Village Baghauli joint ...	10½ annas.	5,764 4 9	1,504 13 0	4,259 7 9
Village Mughlipur ...	2 *biswas*, 16 *biswansis*, 12 *kach*. 1 *nan*. 17-8/27 adhman.	275 0 0	72 0 0	202 1 0
Village Akohra, District Sitapur ...	2 annas 8 pies.	500 0 0	130 0 0	370 0 0
Village Faqirabad Niamat Nagar ...	1 *bigha*, 14 *biswas*, 14 *kach*.	8 0 0	1 12 0	6 4 0
Village Sirsa Mohal (*illegible*) ...	3 *biswas* 1/3 *biswansis*.	200 0 0	100 0 0	100 0 0
Balapur ...	1 anna 2 pies.	60 0 0	16 0 0	44 0 0

The parties have not printed an application which was put in to the District Judge for sale on 18th June 1915 but we have read it in the original file. If an appeal goes to the Privy Council that application shall also be printed as well as the order-sheet of the District Judge's file which we have got translated and typed.

The order of the District Judge passed on 18th June 1915 in vernacular is printed (Exs. 34, Z-23). It appears that one Nawab Nazim Husain was willing to purchase the minors' share in the villages of Akohra, Sirsa, Faqirabad with the hamlet of Niamat Nagar at the rate of Rs. 100 for every 5 annas of profits. This is the property which the defendant Akil finally purchased. The District Judge directed process-fee to be deposited for the summoning of the *patwaris* of those villages and this fee was paid on 19th June. The date fixed for the evidence of the *patwaris* and for inquiry was 13th July when the guardian was directed to appear in person and bring porchasers along.

We have already seen that a second application was put in on 22nd June. On 23rd June the District Judge ordered the guardian to put in a draft of the sale-deed.

On the 16th July a most extraordinary order appears on the order-sheet. It is to this effect: "As neither the applicant nor the *patwaris* are present it is ordered that a notice be sent to the applicant (meaning the guardian) to appear at once." It may be mentioned that all these orders already referred to are in vernacular bearing only the Judge's initials. How the *patwaris* were expected on 16th July when they were directed to appear on the 13th it is difficult to understand.

On 2nd August Mohan Lal's name is disclosed to the District Judge as that of a likely purchaser. The order of the District Judge under that date in vernacular on the order-sheet is "Put up to-day in presence of Mohammad Amil minor with Azizul Haque. The agent states that the guardian is ready to make a sale of Baghauli property in favour of Babu Mohan Lal and Babu Mohan Lal is willing to purchase Baghauli. Order. Let the applicant file the draft at once." (Exhibits 9, Z-24). This vernacular order bears the Judge's initials. It must have been noticed from this narration of facts that action was not taken either on the application of 18th June or of 22nd June and that the District Judge had not questioned the guardian's agent as to this neglect and delay.

After this 17 valuable days were lost and the next order we find is of 19th August 1915. It is the first one in English containing the full signature of the District Judge. This order is: "The terms of the deed have been fully discussed between the Court and the guardian minor boys' agent (meaning presumably agent of the guardian of the minor boys) and purchaser and are reasonable. The transfer is necessary in the interest of the minors and has been approved by me." (Exhibits B-10 Y-160). The draft which presumably was put up before the District Judge is Exs. B-11 (XX-19). This is the order which is cited as authority for the sale on behalf of the minors in favour of Mohan Lal. On that very day the sale-deed (Exs. B-13 Y-161) was executed by the guardian.

Next day on the 20th of August 1915 there is an order in vernacular with the initials of the Judge in English. It is to this effect: "The draft having been put up to-day it is ordered that it be sanctioned and brought on the record. The papers be consigned to the record and the draft be given to the applicant for completion. It cannot be made out which draft is meant. This order is not printed and is not quoted as authority for the sale by the minors' guardian in favour of Mohammad Akil. What is quoted as permission for sale are the words "approved, initials of District Judge, 28th August 1915," on the foot of the draft of the sale-deed in favour of Mohammad Akil. This is not printed anywhere.

The case as against Mohammad Akil is soon disposed of. I hold that there was no permission whatsoever granted for the sale in his favour. "Approved" with the initials of the District Judge on a draft of a sale-deed does not amount to a permission for sale. Under s. 31 of the Guardians and Wards Act it is laid down that the order granting permission to sell shall recite the necessity and describe the property with respect to which the act permitted is to be done, and this order shall be recorded dated and signed by the Judge of the Court with his own hand. Nothing of the sort was done here. It does not even appear that the Judge's attention was drawn to the fact that the draft in vernacular put up before

him was other than the one of a sale in favour of Mohan Lal. As we have seen a certain person had expressed his readiness to purchase these properties at a valuation of Rs. 100 for 5 annas of profits while the sale in favour of Akil was admittedly at the rate of Rs. 100 for 6 annas 3 pies of profits. If the Judge had really been made aware of the details of the transaction of which the draft was put up before him, he would certainly have inquired about this difference in the sale price. Another point was that Mohammad Akil was manager of the property of the minors and the District Judge would have questioned him, if he had been made aware of the proposed sale in Akil's favour how the manager had not been able to pay up the debts without the sale of the property and why Rs. 4,000 was recovered from tenants in advance and what had been done with the sum. The sale by itself being one in favour of the manager of the property of minors whose guardian was a *parda nashin* woman would have excited a suspicion. I am certain that the District Judge was not aware on what paper he wrote the word "approved." In fact the detailed inquiry entered into by this Bench brought to light this word "approved" on the draft of the sale-deed and it was not put forward by the defence as authority for permission in favour of Mohammad Akil. As already noted the draft with the words approved and the District Judge's initials is nowhere printed. The learned Judge of the lower Court appears to have construed the District Judge's order of 19th August as permission for sale in favour of Akil. That order however mentioned one purchaser and one draft and admittedly the draft of the deed in favour of Mohammad Akil was not before him on 19th August. As there was no permission for sale of the property in favour of Mohammad Akil the sale in his favour is voidable. It is not as if Akil was an outside purchaser ignorant of the proceedings taken by the guardian and the Court. In case of *Rameshar Baksh Singh* v. *Ridh Kuar* (2) a Bench of this Court to which my brother was a party held that once a sale is proved to have been effected by a certificated guardian without the permission of the District Judge it becomes voidable without any inquiry as to whether the terms of the transfer were favourable to the minors or not. Under s. 30 of the Guardians and Wards Act a disposal of immoveable property by a guardian without the permission of the District Judge is voidable at the instance of the minor. I would, therefore, dismiss the appeal of Mohammad Akil.

Coming to Mohan Lal's case the circumstances are such as to vitiate the permission for sale granted by the District Judge. Like the famous Pooh Bah in Gilbert's Mikado, Mohan Lal combined in himself many offices. He was friend of the family, money-lender, legal adviser, counsel, mortgagee and purchaser. He was also a man of position in the town of Hardoi and well-known to the Judge. It may easily be imagined how Mohan Lal in one shape could help Mohan Lal in another shape. These shapes were not incarnations as well-understood by Hindus that during a certain period of existence a person has to be consistent in acting up to one certain shape but he had the ability to use all shapes at one and the same time. He himself in his shape of a counsel had put forward the defence that Mohammad Fazil alone was liable to pay the decree of Bishen Narain yet no mention thereof was made by him to the District Judge when he appeared in his shape of a purchaser. Before a Bench composed of men of ordinary common sense it was idle to pretend that Mohan Lal was unaware of what was going on until the 19th of August when he came forward to purchase the property. I am certain that every step was taken under his advice in the Court of the District Judge. It has been noted that as early as 21st of June Akil had mentioned the fact of negotiations between Mohan Lal and the minors for transfer of the minors' property to him. The object of the delay in Mohan Lal's appearing before the District Judge was to prevent the District Judge holding any inquiry whatsoever in the matter of the transfer. In the application for transfer the main necessity for immediate sale was stated to be the pending sale in the execution of Bishen Narain's decree for the amount of Rs. 8,121 yet by sale to Mohan Lal only less than one-tenth of this sum (a sum of Rs. 800) is provided for. The deed in favour of Ajodhiya Prashad and Niranjan Nath is mentioned in the application for permission as an afterthought at the end. A wrong

(2) 87 Ind. Cas. 238; 1 O. W. N. 775.

statement is made with regard to it that a suit on foot thereof would be barred by time on 3rd July 1915. The mortgage-deeds in favour of Ajodhiya Prashad and Niranjan Nath would not be time-barred for a suit till 1935. It was argued that as they had paid off the prior mortgage of Imtiaz Husain and Jumna Prashad the limitation of the suit would have been governed by limitation applicable to the bond in favour of Imtiaz Husain and Jumna Prashad. We do not agree with this argument but even accepting it the suit would not be time-barred before 9th July 1916. The District Judge could not possibly have brought his mind to bear on the facts of the case because if he had done so he would have noticed that the recovery of the money by Ajodhiya Prashad and Niranjan Nath was barred according to the guardian's application on 3rd July 1915 and that, therefore, there was no necessity for the sale of the minor's property to pay that debt after 3rd July 1915. I can well-understand why the names of Ajodhiya Prashad and Niranjan Nath as representing the family were dropped when the matter appeared before the District Judge. The leading lawyer of the Court, Mohan Lal, would be more acceptable to the District Judge than two *banya* money-lenders, and lead to a ready grant of permission by the Judge.

It was argued that the sale in favour of Mohan Lal and the other in favour of Mohammad Akil should be considered together and the Judge must be understood to have the sale-deed in favour of Akil in his mind when he sanctioned the same in favour of Mohan Lal. This argument was raised when it was pointed out by us that the sale in favour of Mohan Lal satisfied a very small part of the decree of Bishen Narain. There is no validity whatsoever in this argument because I am convinced that the proposal of sale in favour of Akil was not before the Judge on 19th August and that on 20th August his approval to the draft in favour of Akil was obtained without his understanding what he was doing. If Mohammad Akil had been in the Judge's mind as a purchaser on 19th August he would have used the words "deeds and purchasers" in plural in his order of that date. The Judge held no enquiry whatsoever and was easily satisfied because he saw in front of him as purchaser a respectable Pleader of his Court and one who had been the legal adviser of the minor's family. In this case also as in Mohammad Akil's, Mohan Lal cannot be permitted to argue that he was in no way concerned with the faulty procedure of the District Judge. Having regard to the position which he occupied it was incumbent on him to disclose the true facts to the District Judge and get a proper order recorded by him. In my opinion he took advantage of the confidence which the District Judge reposed in him. As observed by their Lordships of the Privy Council in the case of *Ganga Pershad Sahu* v. *Maharani Bibi* (3) if any underhand dealing is brought home to the purchaser a formal sanction of the District Judge will not be sufficient. The sanction proceedings taken ostensibly to pay off the decree of Bishen Narain were really taken for the advancement of the interest of Mohan Lal.

It was pointed out by Mohan Lal's learned Counsel that Fazil's liability under the partition to pay the decrees of Imtiaz Husain and Bishen Narain was brought into issue between the parties subsequent to the sale in favour of Mohan Lal and decided in favour of Fazil. In those proceedings also there is Mohan Lal appearing in yet another shape, that of an umpire of arbitrators. These proceedings also indicate what a grip he had over the judicial officials of Hardoi, Mohammad Fazil, Mohammad Akil, Mohammad Amil, who had attained majority by that time and Mohammad Adil plaintiff to this suit and his brother Mohammad Kabil under the guardianship of Mohammad Amil executed a deed of agreement to refer the matters in dispute to arbitration on 24th August 1916 (Exs. B-43 Y-194). On 14th April 1916 the mother had been removed from guardianship and Mohammad Amil had been appointed guardian of his brothers (Exs. B-38Y-188). To sign the agreement Mohammad Amil had to obtain the permission of the District Judge. The District Judge passed the following order: "Read the draft of the agreement. I would sanction it provided Babu Mohan Lal is appointed an umpire and Nazir Husain and Maulvi Nurul Hasan arbitrators". (Exhibits B-42, Y-123). These arbitrators decided the dispute in accordance with a deed of compromise entered into between the parties to the arbitration (Exs.

(3) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. s.) 1012 (P. C.).

B-50 Y-209). According to this award Mohammad Fazil was absolved of the liability to pay the decrees of Imtiaz Husain and Bishen Narain as laid down at the time of partition between him and his brothers. I fail to see how these proceedings improve the position of Babu Mohan Lal with respect to the sale which is impugned. On the other hand they indicate that the question of liability was still in dispute at the time of sale in favour of Mohan Lal and it was the duty of Mohan Lal to call the attention of the District Judge to it on 19th August 1915. Further the proceedings disclose certain persons playing to the tune of Mohan Lal and do not convince me as to the fairness of the final arbitration award.

One further fact may be mentioned that when a pre-emption suit was brought in pursuance of the sale in favour of Mohan Lal, Mohammad Akil made a gift of a small area of his property in favour of Mohan Lal to make out that Mohan Lal was a co-sharer in the village prior to the institution of the pre-emption suit. The judgment of the present learned Judicial Commissioner, Mr. Daniels, is of considerable interest in that connection. It is printed at Z-57 and dated the 1st April 1919. To him the whole transaction of the gift appeared to be suspicious. The deed purported to have been executed on 19th August 1916 though it was registered on the 23rd. The suit was instituted on the 19th August 1916 but the Trial Court held that the deed of gift was executed in the morning of that day and Mr. Daniels was not prepared to reject definitely that finding when his senior colleague on the Bench accepted it. He has, however, indicated the devices of Mohan Lal. After readiug that judgment I feel convinced that Mohan Lal has not only influence over the judicial officials of Hardoi but has also a grip over the staff of the Court. In the pre-emption suit it was represented by the Subordinate Judge's office that the plaint in the pre-emption case was filed just before 4 P. M., though plaints are ordinarily received between noon and 1 P. M.

There is very significant evidence of how the servants of the guardian were acting in the interest of Mohan Lal, and not of the minors. On the date fixed for the sale of Baghauli and Gadanpur properties, Azizul Haque *Mukhtar* of the guardian, applied for postponemnt (Exs. B-23 Y-175). Only Baghauli was sold to Mohan Lal and only Rs. 800 of the consideration money went towards payment of this decree of Bishun Narain. Both Baghauli and Gadanpur were put up to sale. The *mukhtar* promised payment by 26th August and prayed that if money be not so paid only Gadanpur property may be sold. Bishun Narain, another Pleader of Hardoi, consented to this. Does this not show that the servants nominally of the guardian were engaged by Mohammad Akil and were puppets in the hands of Mohan Lal?

Reference during arguments of the appellant's learned Counsel was made to the statements in the lower Court of Kusumbhi Dayal, Mohammad Akil and Manohar Lal. Kusumbhi Dayal is reader of the District Judge's Court. His examination-in-chief reads like the narration of a bad dream. What he wants to convey as his meaning it is difficult to understand. The price remained as was entered in the draft, so all the alleged discussion as to rate in the presence of the District Judge has no relevance. He tells a lie when he says that he examined the papers of the village *patwaris*. *Patwaris* were not summoned for the date and any fool knows that a *patwari* cannot appear in Court unless permitted by the Collector of the District, who has to be moved in the matter. I can make a guess at what happened. This unreliable official of a Court of Law may have hurriedly glanced through the order-sheet of the file before entering the witness-box and knowing that some *patwaris* were summoned, made bold to tell the lie that he examined *patwari's* registers on the 19th August. He again tells a lie when he says that the matter of the sale in favour of Akil was settled on the day the first draft was presented. There is no such note in the order of 19th August in the Judge's hand. In the nature of things, the mind of this man must be entirely blank about what took place in the course of a day's business in a Court where he had worked for ten years prior to giving evidence. He was deposing to a transaction seven years old. He has obviously narrated a tutored story for a consideration. The Registrar of this Court is requested to communicate to the present District Judge of Hardoi my opinion that this reader of his Court is unworthy to occupy a position of trust.

Mohan Lal speaks of a lot of pressing. He was pressed by all and sundry to

increase the price (Y-15). He keeps things purposely vague just as the reader has done. He was pressed before the District Judge by the minors and Adil to increase the price but refused. When was this? There is no note on the record of the file of the District Judge's Court of the minors, Akil and Mohan Lal appearing in his Court before 19th August. Both the reader and Mohan Lal would like me to believe that there were more than one occasion of a meeting and discussion in the District Judge's Court but dare not commit themselves to a definite statement for fear of criminal proceedings. Mohan Lal started making his statement on 28th March; there is no mention there of the examination of *patwari's* books in the Judge's Court. According to him the account of profits was previously prepared by Akil, the minors and the minors' servants. "The vendor admitted these profits before the Judge" says he. Who was the vendor? Mohan Lal talks glibly of the presence of *Musammat* Maryam-un-nissa in Court but we find no mention of her in the English order of 19th August and Mohan Lal himself says that the Judge had to go out to the verandah to inquire of the lady as to execution of the deed when as Registrar, he registered the deed subsequently. Did the lady walk boldly into Court earlier in the day or did the Judge keep moving out of Court and in every few minutes? After all, I have not dropped here from the clouds and have worked wearily up from the post of District Judge held in at least thirty different districts for a period of 22 years. I can believe my being fooled in a moment of weariness from the constant grind of uninteresting work by a Pleader of standing of my Court, whom I liked personally and thought worthy of trust. My usually suspicious nature may be lulled into false security by the sight of a friendly face. But the popping in and out of Court to the merriment of the gapping litigants and the asking of an assurance of the correctness of complicated figures of account from an uneducated helpless *parda nashin* woman would be outside my routine of duties and I am certain of every other District Judge.

Mohan Lal gives no explanation why his appearance before the District Judge and the production of the draft of the sale-deed in his favour were delayed so long. We know that he started negotiations for purchase before 21st June yet it was not till 2nd August that he was disclosed as a purchaser to the District Judge and just a day before the proclaimed sale, he appeared before the Judge as a saviour of the minors. Means were thus adopted to deprive the District Judge of an opportunity of inquiry, even if he had an inclination that way.

It will be noticed that Mohan Lal's statement gives the lie to the statement of the reader Kusumbhi Dayal, recorded much later on 12th July 1922, that the *patwari's* papers were examined in Court.

Mohammad Akil stated on 4th April 1922 that the guardian lady was outside the Court-room during the discussion of 19th August. He does not say that she admitted the correctness of any accounts. He started the story of *patwari's* producing accounts in Court on the 19th August. He, however, does not support Mohan Lal's story of the Judge asking *Musammat* Maryam-un-nissa to verify accounts, which no *pardanashin* lady would be expected to understand.

The examination of the evidence on the record has satisfied me that no inquiry was made by the Judge before sale to the mortgagee Mohan Lal was permitted. One does not even feel sure that the Judge realised that the mortgagees were the purchasers. It is true that the name of Ajodhiya Prashad is common to both transaction but this man was not present before the Judge. There are certain references not very prominent in the deed and in the detail of the consideration which would indicate the identity of the mortgagees and the purchasers. It is doubtful whether the attention of the Judge was drawn to these contents of the draft sale-deed. There was no English translation of the draft before the Judge and one knows how little of the contents of a vernacular document is conveyed by the droning out of that document by a reader. No attempt was made by the Judge to ascertain whether the money alleged to be due on the bond in favour of Ajudhiya Prashad and Niranjan Nath was really due, nor to ascertain whether the amount claimed as paid to Imtiaz Husain was really paid by the mortgagees. The Judge never brought his mind to bear on the astounding result of the negotiations that while the necessity for sale arose over payment

of Bishen Narain's decree of over Rs. 8,000 only a one-tenth of that decree was to be satisfied by the sale of the property of the minors to Mohan Lal. No inquiry was made as to the market value of the property to be sold. It is usual in such cases to request the Collector of the District to report on the matter and the order of the 18th June of this very Judge indicates his usual procedure to send for the *patwaris* of the villages to be sold to discover the amounts of gross rental, revenue and the resultant profit. Such a narrow margin of time was left between the production of the draft of the sale-deed in favour of Mohan Lal and the date fixed for the auction-sale of the property that the District Judge had to take everything on trust and depend upon the good faith of a leading Pleader of his Court, Mohan Lal. The transfer in favour of Mohammad Akil was not before the Judge on the 19th of August. In the case of Mohammad Akil the Judge never inquired how the *sarbarahkar* (manager) of the minor's property had so mismanaged it as to render the sale of the minors' property necessary. The sale was sanctioned by the Judge without any inquiry whatsoever and this was due to the action of Mohan Lal. He did not appear before the Judge until the very last moment though he had started negotiations for the purchase of the property two months earlier. He knew the claim of the minors to be absolved from the liability of paying the decrees of both Imtiaz Husain and Bishen Narain but did not inform the Judge of this claim of the minors. It will be seen that the very man Mohammad Fazil whom he on behalf of the minors held liable for the payment of the above mentioned decrees was a witness to the deed in his favour. Mohan Lal alleged in his statement that he was ready to sue on his mortgage-deed in June 1915 but he had taken no steps towards it nor has he stated that he had informed the minors' guardian that he was about to sue. The statement in the application, therefore, was false that the mortgagees were on the point of bringing a suit. Mohan Lal's learned Counsel argued that the application was made by the guardian mother and not by Mohan Lal. I feel certain that Mohan Lal was fully aware of the contents thereof.

It is laid down under s. 31 of the Guardians and Wards Act that permission to the guardian to sell property shall not be granted by Court except in case of necessity, or for an evident advantage to the ward. This provision of law indicates that the Judge obtains jurisdiction to sanction the sale only when he makes a proper inquiry as to the necessity and advantage of the sale. Clause (2) gives a detail of the points to be recited in the order of the Judge granting permission and in my opinion all those are the points of inquiry necessary to be made under the law. In the case of *Rameshar Bakhsh Singh* (2) already quoted, the judgment was pronounced by a Bench of which my brother Wazir Hasan was a member. The conditions under which the order of the District Judge would be a nullity were laid down there. It was said on page 786* "As regards the mandatory character of the provisions of sub-s. (2) of s. 31 of the Guardians and Wards Act we are quite clear in our mind that the violation of the procedure prescribed by that sub section for recording the order granting the permission cannot be made the grounds of brushing aside the finality of the order as enacted by s. 48. The only condition in which the finality prescribed by s. 48 can be avoided is to establish that the order granting the permission was a nullity. An order passed by a Court in violation of such rules of procedure, however, mandatory as relate merely to the form of the order cannot be treated as a nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or a material irregularity in the circumstances of a particular case. On the other hand, an order passed by a Court in violation of such rules of procedure as the observance of which only invests the Court with jurisdiction to pass the order is a nullity." In the present case there was no inquiry whatsoever and in my opinion the want of such an inquiry without which the Judge is prohibited from granting permission to sell property amounts to a want of jurisdiction in the Judge to proceed with the matter and his order is in consequence a nullity. As I have observed several times in the course of this judgment Mohan Lal is not an innocent purchaser who had relied on the mere words of a District Judge's order as they appear on the surface and had no knowledge of the conditions and facts which resulted in that order.

The District Judge's order sanctioning

*Page of 1 O. W. N.—[*Ed.*]

the sale be a nullity the minor is entitled to avoid the sale.

In the result I would dismiss Appeal No. 37 of 1923 with costs and also Appeal No. 41 of 1923 with costs so far as Mohammad Akil is concerned.

There was a transfer by the certificated guardian so the provisions of s. 30 will apply and the transfer is voidable and not void. The appellant's learned Counsel argued on this foundation that the suit against Waris-uz-zaman being instituted more than three years after the date of the transfer to Mohammad Akil was barred by time. Waris-uz-zaman, however, is a trespasser and limitation in his case will be governed by Art. 144. Transfer in his favour was not made by the ward's guardian. I would, therefore, dismiss the appeal of Waris-uz-zaman also.

Finally there remains for consideration Appeal No. 53 of 1923. The lower Court made it a condition of the cancellation of the sale-deed in favour of Mohan Lal that actual cash should be paid by the plaintiff to the amount of one-third of the ostensible consideration money. I would have preferred to restore parties to their original position of mortgagor and mortgagee as existed on 19th August 1915. The learned Judge of the lower Court has however examined the validity of the consideration of the mortgage and there will be danger of further litigation possibly to the detriment of Mohammad Adil if the dispute between the parties is not finally set at rest in the present litigation. My learned brother also has told me that he will agree with the lower Court. I am, therefore, not prepared to arrive at any other conclusion and would dismiss Appeal No. 53 of 1923 but without any order as to costs.

Wazir Hasan, A. J. C.—Having had the advantage of reading the exhaustive judgment of my learned brother I find that I have very little to say.

In the year 1904 there was a partition of the family estate amongst the three brothers, Mohammad Kamil, Mohammad Akil and Mohammad Fazil, and the debts incurred in respect of that estate by one or all of the three brothers were incorporated in a schedule then prepared and finally each of the three brothers was made liable for an equal proportion to the extent of Rs. 36,692 odd of the total amount of the debts. In this allotment of liability the debts were earmarked. Amongst such of the debts as were thus allotted the sum of Rs. 20,320 due to one Pandit Bishun Narain and another sum of Rs. 4,130 due to Sayid Imtiaz Husain were thrown into the proportion, the liability for which were fixed upon Mohammad Fazil (Ex. No. 4 Zl).

Mohammad Kamil, father of the plaintiff, Mohammad Adil died in February 1909. In April 1909 mutation of names was effected in the revenue papers in respect of Muhammad Kamil's property. The names of his three then minor sons, Mohammad Amil, Mohammad Adil and Mohammad Qabil were substituted in place of Muhammad Kamil's under the guardianship of their mother, *Musammat* Maryam-un-nissa. *Musammat* Maryam-un-nissa is a *parda nashin* lady. Consequently in the application for mutation of names dated the 11th March, 1909 made by the lady the minors and their estate were stated to be under the supervision (*sarbarahkari*) of the minors' uncle, Mohammad Akil. (Exhibits. 16 Y-100). Mohammad Akil is the chief defendant in one of the two suits, out of which these appeals have arisen. Mohammad Akil, therefore, acquired the status of a manager of the minors' estate and in the circumstances this was only natural. Muhammad Akil had been the *mukhtar* of his brother, Mohammad Kamil, and when Muhammad Kamil died he was the eldest surviving member of the family. Mohammad Akil thus stood in a position of confidence to the minors and their mothers and on the evidence in the case it is perfectly clear that he retained this position all along certainly until the transactions now in question were perfected. This is completely demonstrated by the evidence which Mohammad Akil has given in this case in the witness-box, Mohammad Fazil in his deposition says the same.

What was the relationship subsisting between Mohammad Akil and Babu Mohan Lal, the chief defendant in the other suit, on the date of the transaction in dispute? It is admitted on all hands that Babu Mohan Lal has constantly been acting as a Pleader for Mohammad Akil. It is also admitted that Mohammad Akil is an old debtor of Babu Mohan Lal; see in this connection the allegations made in para. 5 of the written statement filed by Babu

Mohan Lal (Ex. X5). It also appears that Mohammad Akil had made a mortgage of a $7\frac{1}{2}$ *biswas* of Baghauli in the year 1902 in favour of one Lal Bishambhar Nath for a sum of Rs. 14,000 principal. Babu Mohan Lal subsequently obtained a transfer of this mortgage from the mortgagee in his favour. Above all we have evidence in the case that the sale made in favour of Babu Mohan Lal was settled by Mohammad Akil. Mohammad Akil in the witness box was very reluctant to admit this but eventually the admission was extracted out of his mouth (Y 36). In the very nature of things and having regard to the position which Mohammad Akil occupied in respect of the minors' property it is highly probable, indeed no other view is reasonably possible that Mohammad Akil negotiated and settled the sale of the minors' property with Babu Mohon Lal. On the 21st June 1915 Mohammad Akil made an application to the Deputy Commissioner of Hardoi, praying for the postponement of the sale of Baghauli and Gadnapur which was then being held and the ground of the prayer was stated by him to be that a settlement had been reached with Babu Mohan Lal and the sanction of the District Judge was required to complete it. This disclosure was made by Mohammad Akil for the first time in that application in which he also stated that he was "carrying on negotiations at a certain place and the applicant having completed the same shall very soon arrange for the money" (Ex. No. B 4 Y-147). We thus reach to the undoubted fact that it was Mohammad Akil who negotiated and settled the sale with Babu Mohan Lal. When the spoils came to be divided between Babu Mohan Laland Mohammad Akil Baghauli naturally fell to the lot of Babu Mohan Lal, who held an enormous mortgage in respect of it and other scattered properties to the share of Mohammad Akil. Mohammad Akil thus abused the confidence reposed in him and thereby obtained an advantage not only for himself but also for his friend Babu Mohan Lal. The two sale-deeds were, in my opinion, inseparable parts of the entire plan. I do not believe for a moment the version now put forward by and on behalf of Mohammad Akil that the sale in his favour was thought of after the bargain with Babu Mohan Lal had been closed. The two transactions must, therefore, stand or fall together.

In the year 1910 Pandit Bishen Narain put his two mortgages of the year 1902 and one of 1903 executed by Mohammad Kamil, Mohammad Akil and Mohammad Fazil in suit. Mohammad Akil, Mohammad Fazil and the three minors sons of Mohammad Kamil under the guardianship of their mother were made defendants to that suit (Ex. B-60 X-70). This mortgage debt was one of the debts the liability for which was imposed upon Mohammad Fazil in the partition of 1904 as already stated, and it appears from the judgment in that suit (Exs. B-61 X-74) that one of the issues raised in the case was as to the liability of Muhammad Fazil on the basis of that partition. The Court held that the issue was not proved. It is obvious, therefore, that the minors' interests were not at all protected by those who were in charge of those interests. A decree was given to Pandit Bishen Narain on the 25th June, 1910, (Exs. B-62 X-80). The mortgaged property was sold in execution of the decree and yet there was a balance of Rs. 15,000 odd left in favour of the decree-holder. To realise this balance he obtained a money-decree on the 7th February 1914. In execution of that decree he attached the whole of Baghauli and the whole of Gadanpur and put them to sale. I will have occasion to pursue these proceedings later.

Another debt the liability for the payment of which had fallen to the share of Mohammad Fazil under the partition of 1904 was the mortgage debt of Imtiaz Husain under the deed of the 9th July 1903, as I have already stated, executed by Mohammad Kamil, Mohammad Akil and Mohammad Fazil. In February 1911 Imtiaz Hussain put his mortgage in suit. To this suit Mohammad Akil, Mohammad Fazil and the three minosr sons of Mohammad Kamil under the guardianship of their mother were made defendants. The other two defendants were Ajodhiya Prashad and Niranjan Nath (Exs. B 21 X-83). These two defendants were impleaded for the reason that they were subsequent mortgagees of the property then in suit under the mortgages of the 31st January 1905 (Exs. B-26 X-30), and the 8th December, 1906 (Exs. B-27 X-64). Ajodhiya Prashad and Niranjan Nath, as we know, constitute a joint Hindu family with Babu Mohan Lal. It must, therefore, be taken that Babu Mohan Lal was also a defendant to the suit in the

guise of Ajodhiya Prashad and Niranjan Nath.

It appears that Babu Mohan Lal's services were engaged by the mother of the minors as a legal adviser and Pleader in that suit and he put in appearance in that suit in that character (Exs. B-24 X-22). Babu Mohan Lal was virtually a defendant to the suit as I have already said. He had no scruple in acting also as a legal adviser in the same suit on behalf or the minors whose estate he held as a mortgagee under the deeds dated the 31st January 1905 and the 8th December 1906; nor did he disclose his dual capacity to the Court. Muhammad Akil, and the minors' guardian, *Musammat* Maryam-un-nissa, filed a joint written statement in that suit. In para. 7 of that written statement the plea of Mohammad Fazil's liability for the debt in suit on the basis of the partition of 1904 was raised (Ex. B-22 X). Obviously this plea was in the interests of the minors. On the other hand the interests of Babu Mohan Lal lay in the contrary direction. The property then in suit being a share in Baghauli was included in the mortgages held by Babu Mohan Lal which mortgages were executed by Mohammad Kamil alone. It would, therefore, manifestly be to the benefit of Babu Mohan Lal if the burden on Baghauli had increased by the decree in Imtiaz Husain's suit. Thus there was a clear case in which Babu Mohan Lal's duty as a legal adviser of the minors pulled him one way and his self-interest the other. The subsequent events, which I shall presently state, amply justify the inference just now made. The suit was eventually compromised and the plea of Mohammad Fazil's liability for the debt in suit met the same fate again as in the previous suit of Pandit Bishun Narain. The defence being in the hands of Babu Mohan Lal the plea could not fair better. Accordingly a decree was given in that suit on the 26th April 1911 (Exs. B-24 X-92). This preliminary decree was made absolute on the 28th October 1911. On the 21st May 1912 Ajodhiya Prasad and Niranjan Nath satisfied this decree and obtained a receipt from the decree holder as evidence of that satisfaction (Exs. B-90 X-61). The satisfaction thus made by Ajodhiya Prashad and Niranjan Nath also of course included the satisafction of the share of Mohammad Akil's liability under that decree. Mohammad Akil, therefore, on the 26th June 1916 executed a deed of mortgage in favour of Ajodhiya Prashad and Niranjan Nath in consideration of the payment made by them on his behalf. The property mortgaged was half of the share which Mohammad Akil owned in Baghauli. Thus Babu Mohan Lal was in a position to add the entire amount of Imtiaz Husain's decree to his own mortgage debt and all that debt, as we know, fell as a burden on Baghauli alone.

I will now revert to the execution proceedings of Pandit Bishun Narain's decree. As already stated Baghauli and Gadanpur were attached and on the 5th May 1915 an order was passed for sale proclamation to issue and the sale was to be held on the 21st June 1915. Between the 5th May 1915 and the 9th June 1915 nothing seems to have been done to avert the contemplated sale. The inference, that I draw, is that Mohammad Akil, the protector of the minors' interests, deliberately, refrained from taking any action in that behalf and his inaction was merely in furtherance of his plan of acquiring the minors' property for himself and his friend Babu Mohan Lal. On the last mentioned date that is, the 19th June 1915, two days before the intended sale, an application purporting to bear the thumb impression of the minors' mother was presented to the sale officer with a prayer that two months' time be allowed and that the sale be fixed to come off on the 20th August 1915. The application was dismissed then and there (Exs. B2 Y-144) we have no reliable evidence on the record to show the circumstances in which this application was made as to who had actually made it. Having succeeded in pushing the case to the penultimate step in the consummation of his design Mohammad Akil revealed himself by means of an application while the sale was being actually conducted on the 21st June 1915. To this application reference has already been made. The prayer for the adjournment of the sale was granted by the Deputy Commissioner with the consent of the decree-holder and 29th August 1915 was fixed as the final date for sale.

On the facts stated above and the contents of Mohammad Akil's application of the 21st June 1915 I am led to the conclusion that the conspiracy between Mohammad Akil and Babu Mohan Lal to acquire the minors' property had matured by the 20th June 1915 but the thickest veil of

secrecy had to be thrown over it in order to obtain the Judge's sanction for the contemplated purchases.

To satisfy his own share of liability in the debts Mohammad Akil gave and Babu Mohan Lal took a mortgage on the day of the execution of the sale-deed in favour of Babu Mohan Lal, that is, the 19th August 1915 (Exs. B-64, X-109). On the 26th June 1916 Mohammad Akil executed another mortgage in favour of Babu Mohan Lal (Ex. B-65, X-114) and finally in the year 1916 a suit was brought against Babu Mohan Lal in respect of the sale now in question to exercise right of pre-emption. Mohammad Akil came to the rescue of Babu Mohan Lal and made a gift of a small portion of property in his favour to defeat the pre-emptor's suit and the result was that the suit failed by reason of the gift (Ex. 23 X-54) to my mind this combination of the two, Babu Mohan Lal and Muhammad Akil, in 1916 in order to preserve the sale of the 19th August 1915 reflects their concerted plan in the matter of the sales in question.

Having obtained the postponement of the sale on the 21st June 1915 on the following day that is the 22nd June 1915, an application was presented to the District Judge on behalf of the guardian of the minors with a prayer that "permission to settle the sale transaction through the general agent Saiyid Azizul Haque be given very soon" (Exs. 10-Y 157). The application was placed before the Judge an the 23rd June 1915 and on that date the learned Judge had before him pending another application with a similar prayer, dated the 18th June 1915, in which a proposal was made to sell certain *pattis* only and not village Baghauli. The application itself has not been printed but from the copy of the order of the Judge passed in relation thereto on the 18th June 1915 we can fairly gather the necessary contents of that application (Exs 34 Z-23). On the application of the 22nd June 1915 the learned Judge passed the order that the draft should be filed. Considering the emergency of the situation one would expect that Judge's order would be immediately complied with. It is admitted that the application of the 22nd June 1915 was intended to obtain an order of sanction from the District Judge with respect to the sale that had been settled with Babu Mohan Lal. Mohammad Akil's application, dated the 21st June 1915, to which reference has already been made, confirms the view that the transaction with Babu Mohan Lal had been closed and that this was done by Muhammad Akil. There was, therefore, nothing to prevent speedy compliance with the Judge's order as regards the filing of the draft, but a speedy compliance with that order would only have been in the interest of the minors and tardiness and delay to the interests of Mohammad Akil and Babu Mohan Lal. In furtherance, therefore, of the interests of these two gentlemen the filing of the draft was delayed to the last possible moment of time. The sale was to come off on the 20th August 1915 and the draft of the sale-deed proposed to be executed in favour of Babu Mohan Lal was represented to the Judge not earlier than the 19th August 1915. The inference that I draw is that the design of these persons was to leave no margin of time which might be utilized by the Judge in making any inquiry into the nature of the proposed sale and its effect on the interests of the minors. The deliberate inaction with the object of gaining an unfair advantage was to my mind an act calculated to deceive and, therefore, fraudulent. "But fraud is infinite in variety; sometime it is audacious and unblushing; sometimes it pays a sort of homage to virtue; and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court."—Per Lord Macnaghten in *Reddaway* v. *Banham* (4). In Story's Equity of Jurisprudence fraud is defined as follows:—

"Fraud in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust of confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another."—Kerr on Fraud and Mistake, page 1. Not less comprehensive is the definition of fraud given in s. 17 of the Indian Contract Act, 1872. Thus these gentlemen succeeded in creating a disposition in the Judge to pass the order of sanction then and there.

(4) (1896) A. C. 199; 65 L. J. Q. B. 381; 74 L. T. 289; 44 W. R, 638.

Now I come to the application for leave to sell dated the 22nd June 1915. I decline altogether to accept the suggestion that neither Mohammad Akil nor Babu Mohan Lal had any hand in the preparation and the making of that application. Indeed the application itself says that the petitioner is a *parda nashin* lady and in the prayer, already quoted, name is mentioned of one Saiyid Azizul Haque as the general agent through whom the intended sale was proposed to be settled. Now who is this Azizul Haque? His name was not mentioned by Mohammad Akil in his application of the 21st June 1915. He was taken in the service of the lady, according to plaintiff, in June 1915 and according to Mohammad Akil, in January 1915. There is no need to decide precisely as to the time at which the services of Azizul Haque were retained. The manager of the estate was Mohammad Akil and the lady was inside the *zanana*. Soon after the sales the services of Azizul Haque were dispensed with. In para. 6 of the plaint in the suit against Mohammad Akil it was alleged that after the execution of the sale-deeds in question Azizul Haque was appointed by a written instrument agent of Mohammad Akil's wife and this allegation was admitted by Mohammad Akil in the corresponding paragraph of his written statement. In the circumstances I think it is reasonable inference to draw that Azizal Haque was brought on the scene by Mohammad Akil to serve as a blind.

The matters which on the face of the application required a patient and prolonged inquiry were many. Some of them may be stated here by way of illustration. Why was the proposal for sale so manifestly advantageous to the interests of the minors made in the application of the 18th June 1915 not being carried to a settlement. How and why the sum of Rs. 4,000 realised in advance as rent from the tenants had disappeared? Why the sum of Rs. 800, the proportion of the minors' liability under Pandit Bishen Narain's decree, could not be provided from the income of the estate, the management of which was in the hands of Mohammad Akil? What was the market value of the property proposed to be sold under the application of the 22nd June 1915?

Coming to the contents of the application of the 22nd June 1915 I find that it is a mixture of *suggestio falsi* and *suppressio veri*. In the forefront of the application the fact of the pending sale in execution of Pandit Bishen Narain's decree is placed and the whole of para. 1 is intended to create an impression on the Judge's mind that the proposed sale would avert the pending auction sale. On the 19th August 1915 when the order of sanction was passed by the Judge (Exs. B-10 Y-160) the Judge was not apprised of the fact that the scheme embraced another sale in favour of Mohammad Akil. The draft of the deed of sale in favour of Mohammad Akil was not presented to the Judge until the 20th August 1915 and on the preceding day the sale in favour of Babu Mohan Lal had become an accomplished fact. The suggestion, therefore, conveyed by the application was that the sale then being considered by the Judge would result in the discharge of the minors' liability under Pandit Bishen Narain's decree. We know, as a matter of fact, that that was not the result at all. The entire consideration of the deed of sale in favour of Babu Mohan Lal was utilized towards the satisfaction of the debts due to Babu Mohan Lal except a paltry sum of Rs. 800, out of the total consideration of Rs. 1,04,800 which Babu Mohan Lal finally paid towards Pandit Bishen Narain's decree, and even after the sale in favour of Mohammad Akil the minors' mother had to contribute a sum of Rs. 900 out of her own pocket to satisfy the liability in its entirety. Another misrepresentation made in the application was that the period of limitation in respect of a suit on the foot of one of the deeds in favour of Ajudhiya Prashad and Niranjan Nath was to expire on the 3rd July 1915 and for that reason a claim in respect of the entire debt due to them was to be put before the Court soon and if so put it would involve the minors in expenses amounting to Rs. 6,000 or Rs. 7,000 more. This point has been dealt with at length by my learned brother in his judgment and I need not pursue it further here.

Under the category of *suppressio veri* in so far as the application of the 22nd June 1915 is concerned four important and outstanding facts may be mentioned. (1) Mohammad Fazil's liability for the debts of Pandit Bishen Narain and Saiyid Imtiaz Husain under the family partition of 1904; (2) the intended purchaser was Babu Mohan Lal and the previous debts

standing in the names of Ajudhiya Prashad and Niranjan Nath were really the debts due to Babu Mohan Lal, (3) as a part of the same transaction another sale was intended to be effected in favour of Mohammad Akil, and (4) finally Babu Mohan Lal had acted as a Pleader for the minors in Saiyid Imtiaz Husain's suit and that Mohammad Akil stood in the position of a manager of the estate and the protector of the interests of the minors. The combined effect of *suggestio falsi* and *uppressiso veri* was clearly to my mind fitted to deceive the District Judge in the matter of sanction.

As regards the sale in favour of Mohammad Akil my learned brother is of opinion that there was no sanction obtained from the District Judge at all. I am not prepared to disagree with the view of my brother. I will however assume that there was such a sanction but how does the case stand on the findings recorded above? Mohammad Akil occupying the position of confidence in relation to the minors settles sale of their property partly to himself and partly to his friend, Babu Mohan Lal. Both parts are indissoluble and form one plan of action and that plan was fraudulent.

The result of the foregoing findings is that Mohammad Akil's position was analogous to that of a trustee and that fraud was committed in obtaining the sanction of the District Judge in respect of the sales. What, then is the law applicable to the facts as found above? The principle of law applicable to the case was laid down in the leading case of *Fox* v. *Mackreth* (5) and it is this that a person in a fiduciary position shall not be allowed to make any advantage out of his position and that the Court will not allow a person to be placed in a position in which his interest shall pull him one way and his duty the other.

In the case of *Ex parte James* (6) Lord Chancellor Eldon, made the following observation:

"This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases". In the case of *Tate* v. *Williamson* (7) Lord Chancellor Chemsford stated the law in the following terms:

"The jurisdiction exercised by Courts of Equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever the parties stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed". In the case of *McPherson* v. *Watt* (8) an attorney, John Watt, purchased four houses, the property of his client, two for himself and two for his brother, Dr. Watt, the entire sale having been completed in the name of the brother. The sale of the two houses in favour of the attorney himself was set aside on the ground that he did not disclose that he was the purchaser. In setting aside the sale in favour of Dr. Watt also Lord Blackburn said: "My Lords, I have come to the conclusion (I am sorry for it, because I think it presses hardly upon Dr. Watt) that the contract is one entire contract for all the four houses as a lump thing, and if we were to say that one part of it should be set aside and the other part enforced, we should really be making two contracts of it. It follows that if we say that it ought to be set aside in the case of John Watt, then it must be set aside altogether, and consequently the appeal must be al-

(5) (1788) 2 Wh & T. L. C. 725 (7th Ed. p. 709); 2 Bro. C. C. 400; 29 E. R. 224; 2 R. R. 255.
(6) (1803) 7 R. R. 56; 8 Ves. Jun. 337; 32 E. R. 5.
(7) (1867) 2 Ch. 55; 15 L. T. 549; 15 W. R. 321.
(8) (1878) 3 A. C. 254.

lowed *in toto*". I have already said that in the present case both the sales one in favour of Babu Mohan Lal and the other in favour of Mohammad Akil were arranged and brought to completion by Mohammad Akil. On the principle just now stated both the sales must be set aside. Nor is the sanction obtained from the District Judge in respect of these sales of any avail, the reason being that it was obtained by fraud. "Fraud", said De Gray C. J., is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice". *The Dutchess of Kingston's case* (9).

On the other issues in the case I have nothing to say except that I entirely agree with the conclusions of my learned brother in respect of them.

I agree with him that the two suits out of which these appeals arise are not barred by limitation either against the original defendants or against the defendant Wasiuz-zaman subsequently impleaded. I also agree with my learned brother that the terms on which the Court below has set aside the sales are proper and should not be interfered with.

On the above grounds I agree that the Appeals Nos. 37 and 41 should be dismissed with costs and Appeal No. 53 be also dismissed but without costs.

By the Court.—For the reasons given in our separate judgments we dismiss Appeals Nos. 37 and 41 with costs and Appeal No. 53 without any order as to costs. As regards Appeal No. 53 we extend the time for deposit of Rs. 34,933-5-4 in the Trial Court to three months from to-day's date. In default of such deposit being made within the time specified the plaintiff's suit shall stand dismissed with costs.

Appeals dismissed.

Z. K.

(9) 20 How. St. Tr. 44.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 116 OF 1924.

February 13, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr Justice Coyajee.

JAGANNATH NATHU—DEFENDANT—APPELLANT

versus

ICHHARAM NAROBA VANI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Civil Procedure Code (Act V of 1908), ss. 37, 38, 150—Decree charging immoveable property—Property transferred from jurisdiction of Court which passed decree to jurisdiction of another Court, effect of—Application for execution presented to Court which passed decree—Step-in-aid of execution—Limitation, extension of.

Where after the passing of a decree charging certain property with the payment of a sum of money, the property charged is transferred from the jurisdiction of the Court which passed the decree to the jurisdiction of another Court, then under the provisions of s. 37 of the C. P. C. the latter Court must be deemed to be the Court which passed the decree. It does not follow, however, that the former Court ceases thereby to be the Court which passed the decree so as to render an application for execution made to it an application to a Court which was not the proper Court for the purposes of cl. (5) of Art. 182 of Sch. I to the Limitation Act. Such an application would nevertheless amount to an application to take a step-in-aid of execution and would operate to extend limitation. [p. 88, col. 1.]

First appeal from the decision of the First Class Subordinate Judge, Jalgaon, in Darkhast No 805 of 1923.

Mr. *D. C. Vinkar*, for the Appellant.

Mr. *V. D. Limaye*, for the Respondent.

JUDGMENT.—A consent decree was passed in this case on March 18, 1912, by the First Class Subordinate Court at Dhulia against two defendants separately, each being made liable for Rs. 6,500 payable by annual instalments of Rs. 650 each together with interest due commencing from November 1, 1912. The decree charged the properties of the two defendants separately. The decree against the first defendant is being executed in Dhulia, as his property is in that Court's jurisdiction. The property of the second defendant at the time the decree was passed was also within the jurisdiction of the Dhulia Court. On June 9, 1920, the Jalgaon Court was made a First Class Court, and as the second defendant's property was within the jurisdiction of that Court, a question arose with regard to the further execution of the decree against him. The *darkhast* of 1921 was filed against both the defendants in the Dhulia Court. On February 22, 1922, the Dhulia Court

held that as far as the second defendant was concerned it had no jurisdiction as the properties of defendant No. 2 were not in that Court's jurisdiction. The plaintiff then presented a *darkhast* to the Jalgaon Court on August 14, 1923.

The second defendant contended that the *darkhast* of 1921 was not a proper step-in-aid of execution, not being made to the proper Court. The First Class Subordinate Judge, following the Full Bench decision in *Seeni Nadan* v. *Muthuswamy Pillai* (1) held that the application to the Dhulia Court which passed the decree originally, even after the territorial jurisdiction was transferred to the Jalgaon Court, would be a proper step-in-aid. He, therefore, held that the *darkhast* filed in his Court was in time. The Madras decision relied upon by the First Class Subordinate Judge is directly in point. The matter there was fully argued, and we see no reason why we should dissent from the view taken by the learned Judges on the question of the construction of ss 37 and 38 of the Code taken together with s. 150. The Dhulia Court was the Court which passed the decree, and after certain territories within its jurisdiction had been transferred to the Court at Jalgaon, then under the provisions of s. 37 the Jalgaon Court would be deemed to be the Court which passed the decree. It does not follow that the Dhulia Court ceased to be the Court which passed the decree as to make an application for execution made to it an application to a Court which was not the proper Court. As the decree itself must have been lying in the Dhulia Court, we should have thought that the proper order to be made on the *darkhast* of 1921 was to transfer the decree or a certified copy thereof so far as it concerned the second defendant to the Jalgaon Court. In any event we think the Judge was right in holding that the *darkhast* was in time. The appeal, therefore, must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 53 Ind. Cas. 213; 42 M. 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

May 22, 1925.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

BAI MONGHIBAI AND OTHERS—APPELLANTS

versus

PRAGJI DAYAL HARIANI—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Appeal to Privy Council—Findings of fact, concurrent—Case not otherwise fit for appeal—Appeal, whether lies.

In a case in which a Will was propounded the Trial Court approaching the question with a mind fully open to the suspicious circumstances attending the execution and fully open also to the principles of law in accordance with which it was its duty to try the question, came to the conclusion that the testator was of sound disposing mind when he executed the Will and that it truly was his Will, and this finding was affirmed by the High Court on appeal. The High Court in affirming the finding did not ignore any rule of law or misdirect itself in any way:

Held, (1) that the case was entirely one of evidence and of the conclusion to be drawn from evidence and that it involved no substantial question of law; [p. 89. col. 1]

(2) that there was nothing in the nature of the case to bring it within the limited and rare class of exceptional cases in which the Privy Council would be induced to review even concurrent findings of fact; [*ibid.*]

(3) that the case was not otherwise a fit one for appeal within the meaning of cl. (*c*) of s. 109 of the C. P. C., and that consequently no appeal lay to the Privy Council [*ibid.*]

Messrs. *John Simon*, *L. De Gruyther*, *George Lowndes* and *D. S. McNair*, for the Appellants.

Messrs. *Fairfax Luxmore* and *E. B. Raikes*, for the Respondent.

JUDGMENT.

Lord Sumner.—It is unnecessary to go into the circumstances of this matter at any length. A Will was propounded. The Trial Judge, so far as their Lordships can see after a very careful examination of his judgment, approaching the question with a mind fully open to the suspicious circumstances attending the execution and fully open also to the principles of law in accordance with which it was his duty to try the question, came to the conclusion that the testator was of sound disposing mind when he executed the Will, and that it truly was his Will. This was his finding of fact and he passed a decree accordingly. On appeal that decree was affirmed. The learned Judges in the High

Court reviewed the facts with minds even more alive than the Trial Judge's mind had been to the suspicious circumstances, and, in spite of what has been said without, in their Lordships' opinion, ignoring any rule of law or mis-directing themselves in any way, and especially so in attaching importance to the fact that the Trial Judge had accepted as true the evidence given before him by a Solicitor, whose report of the transaction, if it was believed, was sufficient by itself to sustain the grant that had been made. It was argued that there was some error in law involved or some substantial question of law raised in this appeal, but, after every possible attempt had been made in that direction, it became quite clear that there was no issue except an issue of fact. Even the learned Judges of the High Court, who granted their certificate that the case was a fit one for appeal under s. 109 (*c*) of the C. P. C., said, in terms that make this certificate somewhat unusual in their Lordships' experience, that they could not see what the question of law was. Their Lordships for their part can find none. They consider that the case was entirely one of evidence, and of the conclusion to be drawn from evidence, and the two Courts concur in their finding. There is nothing apparent upon an examination of the nature of this case to bring it within the limited and rare class of exceptional cases, which have occasionally induced the Board to review even concurrent findings of fact. The real complaint against the transaction is not that the execution of the Will was in any way extraordinary, but that the character of the Will was such as seemed to both the Courts below to have been somewhat of an injustice on the part of the testator towards his wife and children. With this their Lordships have nothing to do. The only result, in their opinion, which can follow in a case of this kind is that the appeal must fail, with the usual consequences as regards costs, and their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent:—Messrs. *Ashurst, Morris* and *Craig.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1179 OF 1923.

April 8, 1925.

Present:—Mr. Justice Stuart.

CHUNNI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Chaudhri BALDEO SINGH—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit to recover price of trees cut and removed by defendant—Misappropriation, allegation of—Suit, whether cognizable by Small Cause Court—Custom—Landlord and tenant—Occupancy tenants, whether entitled to cut and remove trees of spontaneous growth—Vaira Firozepore in Bulandshahar District—Wajib-ul-arz, entry in, effect of—Appeal, second—Finding as to custom, whether can be questioned.

The plaint in a suit by a landlord against an occupancy tenant for recovery of the price of certain trees alleged to have been cut and removed by the tenant stated that the tenant had misappropriated the trees and that his act was contrary to law and justice :

Held, that the suit fell within the purview of Art. 35 (*ii*) of Sch. II to the Provincial Small Cause Courts Act and was, therefore, excluded from the cognizance of a Small Cause Court. [p. 90, col. 1.]

Ordinarily trees of spontaneous growth standing on fields in the cultivation of tenants are, in the absence of a special custom or contract to the contrary, the property of the *zemindar*. [*ibid.*]

In deciding whether there is a custom by which occupancy tenants of a particular village are permitted to cut and use trees of spontaneous growth on their holdings the Court must look at the first *wajib-ul-arz* that was made after occupancy tenants came into existence, and if it finds that since the date of that *wajib-ul-arz* the tenants have been held to have been entitled to cut and use such trees, the Court ought to give effect to such custom. [p. 91, col. 2.]

A statement by the *zemindars* of a village incorporated in the *wajib-ul-arz* that they would permit their occupancy tenants to cut and enjoy trees of spontaneous growth standing upon their holdings, creates a valid contract between the *zemindars* and the occupancy tenants and the contract is binding upon the successors of the *zemindars*. [*ibid.*]

Occupancy tenants in the village of Vaira Firozepore in the Bulandshahr District are entitled to cut and remove trees of spontaneous growth standing on their holdings. [p. 90, col. 1.]

Where a lower Appellate Court has refused to accept oral evidence as sufficient to establish the existence of a custom its refusal cannot be reversed in second appeal, but when it comes to the question of determining the legal point as to which of two *wajib-ul-araez* should be held to govern a case it is permissible to find that a custom exists where the lower Appellate Court finds that no custom exists. [p. 91, col 2.]

Second appeal against a decree of the Subordinate Judge, Bulandshahr, dated the 20th of April 1923.

Mr. *Baleshwari Prasad*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal raises a

question of importance to the *zemindars* and the tenants of the village of Vaira Firozepur in the Bulandshahr District. The suit was brought by one of the *zemindars* against 12 occupancy tenants for damages on the allegation that they had without right cut and removed 11 trees of spontaneous growth standing upon their occupancy holdings. It is to be noted that the plaint laid stress on the fact that they had misappropriated these trees and alleged that their acts were contrary to law and justice. The suit was for damages for Rs. 100. It was originally filed in the Court of the Judge of Small Causes at Bulandshahr but was transferred to and decided by an Honorary Munsif.

The Honorary Munsif found that in the village in question certain tenants (the defendants belonging to that class of tenants) had a right to cut trees of spontaneous growth standing on their fields and dismissed the suit. The plaintiff appealed and his appeal was heard by a Subordinate Judge. The Subordinate Judge decided that the defendants had no right to cut the trees and awarded damages for Rs. 100. A second appeal is filed in this Court.

A preliminary objection is taken that no second appeal lies. The objection is on the ground that the suit was a suit cognizable by a Court of Small Causes, and that the value and the amount of subject-matter did not exceed Rs. 100. I decide against this objection. Since the amendment of Art. 35 (*ii*) of the Second Schedule Act IX of 1887, Small Cause Courts are not competent to decide suits for compensation for acts which are or save for the provisions of Ch. IV of the Indian Penal Code would be offences punishable under Ch. XVII of the said Code.

It is clear from the plaint itself in which it is asserted that the acts of the defendants were contrary to law and justice and amounted to a misappropriation; that according to the allegations therein the cutting of these trees constituted a criminal offence punishable under Ch. XVII—presumably an offence of theft. So a second appeal lies against the decision.

The decision of the appeal involves discussion of several points. While it is recognized by what is rather loosely called 'the common law of this province' that trees of spontaneous growth standing on fields in the cultivation of tenants are in the absence of special custom or contract the property of the *zemindars*, there is in this particular case evidence that in this village trees of spontaneous growth standing upon the holdings of occupancy tenants, (as the appellants are) are the property of the occupancy tenants and it is to be seen whether the finding of the learned Subordinate Judge to the contrary is a finding which can be upheld.

The words "occupancy tenants or *raiyats* having rights of occupancy" were not used as far as I am aware—until the enactment of Act X of 1859 which for the first time recognized (and in many instances created) the right of an agricultural tenants who had cultivated the same plot of land for more than twelve consecutive years to resist an ejectment so long as he paid his rent. This Act applied to Bengal, and the present Province of Agra which was then known as the North-West Provinces and was included in Bengal.

While this Act was in force the Settlement of Mr. Currie took place in the year 1866 in the Bulandshahr District and in this village the following entry was made in the *wajib-ul-arz*.

"Such trees as are of spontaneous growth whether they are or are not standing upon the fields of tenants or the borders of such fields are our" (*i. e.*, the *zemindars*) property. They may be cut with our permission in order that their wood may be used for the manufacture and repair of the tenants' agricultural implements or the repair of their houses, but they are not to be cut without our permission."

This passage shows satisfactorily enough that up to 1866 trees of spontaneous growth standing upon such fields were the property of the *zemindars* of this village. No attempt was made to distinguish the persons who under the Act X of 1859 would be described as "*raiyats* having the right of occupancy and other agricultural tenants," from other tenants.

In 1873 the first Rent Act was passed which had application to the "North-West Provinces" only, and under it the rights of occupancy tenants were further defined and not defined exactly in the same manner as they had been defined in Act X of 1859. In 1873 for the first time there came into existence the North-West Province an "occupancy tenant "as distinguished from a "*raiyat* having the right of occupancy" as previously recognized both in Bengal and the North-West Provinces. In 1889 Mr.

Stoker made the next Settlement of Bulandshahr and in the Settlement there appear in the *wajib-ul-arz* of this village the following words:—"Trees of spontaneous growth which stand on the fields on the borders of the field of *occupancy tenants* may be cut by such tenants at their will but those standing in the inhabited area can only be cut with the permission of the *zemindars*."

Since the Settlement of 1889 there have been no fresh entries in the *wajib-ul-arz* and the entry of 1889 is the last entry made. The record has now attained the comparatively respectable age of thirty-six years —something over a generation.

The learned Honorary Munsif arrived at the conclusion that the entry of this Settlement of 1889 must be taken to bind the case. The *patwari* of the village and two *lambardars* further gave evidence that to the best of their knowledge and belief occupancy tenants such as the defendants had a right to cut the trees of spontaneous growth upon their holdings.

The learned Subordinate Judge refused to accept the oral evidence of these persons and his decision on that point cannot be interfered with in second appeal. But he went further. He held that the entry in the Settlement of 1866 bound the case and that the entry in the Settlement of 1889 was of no effect. He took the position that in order to oust the *zemindars*' rights there must be a custom existing from times immemorial.

If the existence of a custom existing from times immemorial were necessary for the purpose it is obvious that occupancy tenants could have no rights at all, for so far from existing from times immemorial they only came into existence in this Province in 1873.

Apart from the question of custom there is the question of contract.

It is not correct in the first instance to say that in the United Provinces it is necessary to prove a custom from times immemorial to establish such a right as the right asserted. The leading case upon that point which has always been recognized as the main authority in this Court is the case of *Kuar Sen* v. *Mamman* (1) in which Banerji, J. stated at page 92*.

"We cannot in these provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the Counsel for the appellant to do would be to destroy many customary rights of modern growth in villages and other places. The Statute Law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed. And, in our opinion, it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period."

Applying these principles, it would appear that in deciding whether there is a custom by which occupancy tenants of this village are permitted to cut and use trees of spontaneous growth on their own holdings we should look at the first *wajib-ul-arz* that was made after such tenants came into existence and when we find that for over thirty-six years this record of custom has held the field that it would be right to apply it.

It has been pressed by the respondents' learned Counsel that it is not open to this Court to disturb a finding of the lower Appellate Court to the effect that no custom exists. He is not quite right in his law upon that point. Where a lower Appellate Court has refused to accept oral evidence as sufficient to establish the existence of a custom its refusal cannot be reversed in second appeal but when it comes to the question of determining the legal point as to which of two *wajib-ul-araiz* should be held to govern a case it is permissible to find a custom exists where the lower Appellate Court found that no custom exists.

But in any circumstances even if there be no custom in the matter the entry in the *wajib-ul-arz* of the Settlement of 1889 constitutes a valid contract as far as the parties are concerned. When the *zemindars* in 1889 agreed that they would permit their occupancy tenants to cut and enjoy trees of spontaneous growth standing upon their holdings a *zemindar* in later years cannot be allowed as against that to claim such trees from occupancy tenants.

The suit must fail and the appeal must succeed. I decree the appeal accordingly and direct that the suit of the plaintiff stands dismissed. The plaintiff will pay his own costs and those of the defendants in all Courts.

BDZ. K. *Appeal allowed.*

(1) 17 A. 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381.

*Page of 17 A.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE NO. 4-B OF 1925.

April 8, 1925.

Present:—Mr. Kotval, A. J. C.

HUSSAINBHAI BOHARI—APPLICANT

versus

THE COMMISSIONER OF INCOME TAX —NON-APPLICANT.

Income Tax Act (XI of 1922), s. 2 (14)—Registration of firm—Application for renewal of certificate made before commencement of financial year—Certificate, validity of.

A registered firm applied on 16th December for renewal of the certificate of registration for the financial year commencing on the 1st of April following, under s. 2 (14) of the Income Tax Act. The Income Tax Officer issued a certificate of renewal which stated that the registration would have effect from the 1st of April following :

Held, that the firm must be regarded as being duly registered in respect of the financial year beginning on the 1st of April following the month of December in which the certificate of renewal was granted. [p. 94, col. 2.]

Application for revision of an order of the Commissioner, Income Tax, dated the 22nd May 1924.

Mr. *W. B. P. Pendharkar*, for the Applicant.

Mr. *G. P. Dick*, Government Advocate, for the Non-Applicant.

ORDER.—On the 16th December 1922 a certificate of registration under r. 4 of the rules made by the Board of Inland Revenue in exercise of the powers conferred by the Indian Income Tax Act, 1922, was granted to the firm of Jafferji Hiptullabhai of Amraoti by the Income Tax Officer. At the end of the certificate is written "This certificate of registration has effect from the 1st day of April 1923."

On the 11th December 1923 the firm was assessed by the Assistant Commissioner to Rs. 6,409-14-0 income tax, and Rs. 1,148-4-0 super-tax for the year 1923-24. The firm objected to the super-tax on the ground that as it was a registered firm it was not liable to super-tax. This objection was disallowed on the only ground that the assessee "did not apply for registration for the account year." The firm appealed to the Commissioner of Income Tax but the appeal was dismissed. The Commissioner held that the certificate of registration could have no effect after the 31st March 1923. His reasons are stated as follows :—

"The Income Tax Officer had obviously made a blunder. He should have referred the appellants to submit the application after the 1st April 1923 and told them that the registration could have effect only till the end of the financial year during which the application for registration was presented, but as observed by the learned Judges of the High Court of Allahabad in *In the matter of Lalla Mal-Hardeo Das Cotton Spinning Mills* (1), the mere blunder of the Income Tax Officer does not convert a really unregistered firm into a registered firm if the prescribed rules are not strictly followed. Ignorance of law is no excuse and it was the business of the petitioners to acquaint themselves with the rules on the subject before presenting the application for renewal. The certificate of registration referred to by the appellants can have no effect after the 31st March 1923. The Assistant Commissioner has, therefore, rightly held that the petitioners constituted an unregistered firm."

The firm then moved the Commissioner for a reference to the High Court. The Commissioner refused to state the case on the ground that no question of law had arisen. On the application of the firm to this Court the Commissioner was required to state the case and refer it. This has now been done. The question referred is stated by the Commissioner as follows :—

"The point of law that now seems to be involved is as given in the application filed by the assessee before the High Court, *i. e.*, 'Whether the applicant was a registered firm within the meaning of s. 2 (14) of the Income Tax Act for the year 1923-24 though the application was made before the 1st of April 1923 and was registered on the 16th December 1922 with the addition of the words, "The certificate of registration has effect from the 1st of April 1923."' "

The reason given by the Assistant Commissioner that the assessee did not apply for registration for the account year is incorrect. The application dated the 11th December 1922 stated "Renewal for the year 1923-24 is wanted," and the certificate purports to have been granted for that year. The Commissioner, however, in his reference explains that what the Assistant Commissioner meant was that the registration to have effect in the assessment of 1923-24 should have been applied for and sanctioned after the 1st of April 1923 and

(1) 75 Ind. Cas. 339; 46 A. 1; 21 A. L. J. 703; (1924) A. I. R. (A.) 137.

that as it was made before the 31st March 1923 it ceased to have effect after that date (*vide* r. 6 of the Income Tax Rules).

The Commissioner's reasons for the finding against the firm are as follows :—

"5 (1) To be called a registered firm, a firm has to be registered with the Income Tax Officer in the prescribed manner, s. 2 (14). This manner is prescribed by rr. 3, 4 and 5, etc. Rules 5 and 6 state that the certificate of registration shall have effect from the date of registration up to the end of the financial year in which it is granted. In the present case the certificate of registration was granted on the 16th December 1922 and under r. 5 it took effect from that date and under r. 6 it ceased to have effect after the 31st of March 1923. The applicant's contention as regards the old practice cannot hold good as no practice against law can be cited as a precedent.

"(2) Under Central Provinces Gazette Notification No. 9, dated the 5th May 1922, published at page 102 of the Central Provinces Gazette, Part II, dated the 13th May 1922, it is clearly said that in all cases where the total assessable income is Rs. 40,000 and above, the powers of Income Tax Officer shall be exercised by the Assistant Commissioner. Thus as this case was one where the income was over Rs. 40,000, the registration in this case too should have been made by the Assistant Commissioner, *vide* remarks of the learned Judges of the High Court of Allahabad in the case of *In the matter of Lalla Mal-Hardeo Das Cotton Spinning Mills* (1). The Income Tax Officer, Amraoti, had thus acted beyond his powers in granting the certificate under question.

"(3) From the application of the assessee to the High Court it seems that he doubts whether under any provisions of the Income Tax Act of 1922, he is bound to apply for the registration of the firm after the 1st of April of every taxable year. To this I would draw the attention of the learned Judges of the Allahabad High Court in the case cited above which clearly says: "The obvious intention of the rules as shown by the wording of the prescribed form of the certificate is that such applications should ordinarily be presented in the month of April, the first month of the financial year." In December 1922 no return of income under sub-s. (2) of s. 22 of the Indian Income Tax Act XI of 1922 was even due and, therefore, no application for registration could be made in December 1922 to take effect in financial year 1923-24."

The question referred to the High Court is whether the certificate is not effective because it was not applied for and given at the right time. Throughout the proceedings, original, appellate or in connection with the application for reference to the High Court, there is no reference to the incompetency of the Income Tax Officer to grant the certificate and the question of such incompetency is not referred to me and I do not go into it.

I now take up the first and the third reasons. The firm had been registered in previous years and it is admitted on behalf of the Commissioner that this is a case of renewal of the certificate referred to in r. 6 of the Income Tax Rules. According to this rule the application for renewal should be made on or before the date on which the return under sub-s. (2) of s. 22 of the Act is due. It is admitted in this case that the return was due on or about the 3rd of June 1923. The application was made on the 16th December 1922 with the instrument of partnership and a copy thereof. It was thus properly made so far as the time prescribed for making it is concerned. Rule 4 provides that on the production of the instrument of partnership or its copy the certificate shall be entered in writing on the instrument or copy and prescribes that it shall be signed and dated by the Income Tax Officer. I take it that this rule applies also to the case of a renewal of a certificate. This rule was also complied with. Thus there was no infringement of any rule as to the time for applying for and renewal of the certificate. The Commissioner's reason based upon rr. 5 and 6 is somewhat technical and is open to be answered by a similarly technical reason that r. 5 and the first part of r. 6 upon which he relies refer to an original grant of certificate and not to a renewal in respect of which nothing is said as to the date from or to which it shall have effect and that, therefore, the duration of its effect is governed by what it itself says.

Leaving aside the technical answer and assuming that the same considerations apply to a renewal of a certificate as to an original grant of it I think the effect of rr. 5 and 6 is not to render void a certificate granted before the month of April on an application made before that month. I

quite agree with the remarks of the learned Judges of the High Court of Allahabad quoted in the second reason by the Commissioner. The use by them of the word "ordinarily" is to be noted. An absolutely strict compliance with the intention of the rules if insisted on might lead to inconsistencies. Under r. 4 the certificate has effect from the date of registration of the firm. The granting of the certificate and the registration are effected by one and the same act of the Income Tax Officer. The form of the certificate states that it has effect from some day in April. Therefore the registration must be on some day in April. The application, therefore, also must be made at the latest on some day in that month. It is admitted in this case that it need not have been made in April but could have been made any time before the 3rd June 1923 under r. 2. There will thus be an inconsistency between r. 2 and the intention of rr. 5 and 6. Suppose again the application is made just before the closing time of the office on the last day in April. Is the officer expected to register the firm and grant the certificate before the 1st of May? If it is open to the Income Tax Officer to register the certificate after the last day of April, then there will be an inconsistency between the form of the certificate and r. 5.

In my opinion the presentation of the application before April was not improper and this is now admitted on behalf of the Commissioner. After all it does not appear to be the firm's fault that the certificate was granted before and not after the month of April. There was nothing to prevent the Income Tax Officer from keeping back orders on the application till the month of April. There was no ambiguity as to what financial year the certificate was applied for and in fact it was issued for the year 1923-24. If the Income Tax Officer had postponed endorsing the certificate till the month of April admittedly no difficulty would have arisen. I fail to see how in the face of the express statement in the certificate that it had effect from the 1st day of April 1923 it can be said that it took effect from the 16th December 1922 and ceased to have effect after the 31st March 1923. No effect for the period between these two dates was purported to be given to the certificate. *In the matter of Lalla Mal-Hardeo Das Cotton Spinning Mills* (1) the case referred to by the Commissioner, the facts were different as would appear from the question referred to the Court which is as follows :

"Whether, when the firm did not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year was due, it can be held to be registered firm for the year in question by filing the application prior to the assessment?"

The question was answered in the negative. It was found that there was not in existence before the date on which the return was due an instrument of partnership and the firm was not then in a position to apply for registration and that in fact it had not applied before such date. It was further found that on the day on which the assessment was made there had been in fact no certificate granted to the firm. The question arising in the present case was not decided.

My answer to the question referred to this Court is in the affirmative. The firm will get its costs of this reference. I fix the Pleader's fee at Rs. 30.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

PRIVY COUNCIL APPLICATIONS NOS. 4 AND 5 OF 1925.

February 11, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir George Claus Rankin, KT.,

SOURENDRA NATH MITTER AND OTHERS—PLAINTIFFS—RESPONDENTS—PETITIONERS

versus

Srimati TARUBALA DASSI—DEFENDANT—APPELLANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 109 (a)—Privy Council appeal—Order of remand—Final order—Test.

An order of the High Court dismissing an application for recording an adjustment of a suit and remanding the case to the Trial Court for trial is an interlocutory order and is not a 'decree' or 'final order' passed on appeal as contemplated by s. 109 of the C. P. C. [p. 96, col 2.]

Maharajah Moheshur Singh v. *Bengal Government*, 7 M. I. A. 283; 3 W. R. P. C. 45; 1 Suth. P. C. J. 325; 1 Sar. P. C. J. 645; 19 E. R. 316, followed.

Per *Rankin, J.*—The test of 'a final order' is that the party has the right to appeal at once. [p. 97, col. 1.]

Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court. [p. 97, col. 2.]

Secretary of State for India v. *British India Steam Navigation Co.*, 9 Ind. Cas. 183; 13 C. L. J. 90; 15 C. W. N. 848, followed.

Application for leave to appeal to His Majesty in Council against an order of a Division Bench of this Court (Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose), dated the 18th December 1924, reported as 88 Ind. Cas. 369, in Appeal from Original Decree No. 94 of 1924 and Appeal from Order No. 136 of 1924.

ARGUMENTS.—Mr. *S. C. Bose* (with him Babu *Nandagopal Banerjee*), for the Petitioners.—This is an application for leave to appeal to the Privy Council against the judgment of Walmsley and B. B. Ghose, JJ., reversing the judgment of the learned Subordinate Judge. My clients are entitled to leave under s. 109 (*a*), C. P. C.

Mr. *B. L. Mitter* (with him Sir *P. C. Mitra* and Babu *Surendra Nath Basu*), for the Opposite Party.—The order sought to be appealed from is not a 'final order.' The order merely dismisses an application for recording an adjustment and further directs the Court below to go on with the suit in the ordinary way as if no application for adjustmant was made. Such order cannot possibly be a 'decree' or 'final order' within the meaning of s. 109, C. P. C. Refers to unreported decision in P. C. Application No. 100 of 1923 (*Hari Naran De* v. *Haribhusan De*), *Shankar Bharati* v. *Narasimha Bharati* (1), *Saiyid Muzhar Hossein* v. *Bodha Bibi* (2), *Saratmani Debi* v. *Bata Krishna Banerjee* (3), *Maharajah Moheshur Singh* v. *Bengal Government* (4), *Alexander John Forbes* v. *Ameeroonissa Begam* (5), *Sheonath* v. *Ramnath* (6) and *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (7).

(1) 69 Ind. Cas. 80; 47 B. 106; 24 Bom. L. R. 925; (1922) A. I. R. (B.) 383.

(2) 22 I. A. 1; 17 A. 112; 5 M. L. J. 20; 6 Sar. P. C. J. 580; 8 Ind Dec. (N. S.) 397 (P. C.).

(3) 4 Ind. Cas. 459; 10 C. L. J. 336 at p. 338.

(4) 7 M. I. A. 283; 3 W. R. P. C. 45; 1 Suth. P. C. J. 325; 1 Sar. P. C. J. 645; 19 E. R. 316.

(5) 10 M. I. A. 340; 5 W. R. P. C. 47; 1 Suth. P. C. J. 621; 2 Sar. P. C. J. 153; 1 Ind. Jur. (N. S.) 117; 19 E. R. 1002.

(6) 10 M. I. A. 413; 5 W. R. P. C. 21; 1 Ind. Jur. (N. S.) 161; 1 Suth. P. C. J. 616; 2 Sar. P. C. J. 134; 19 E. R. 1029.

(7) 12 M. I. A. 157; 11 W. R. P. C. 19; 2 B. L. R. P. C. 44; 2 Suth. P. C. J. 190; 2 Sar. P. C. J. 403; 1 Ind. Dec. (N. S.) 511; 20 E. R. 299.

Mr. *S. C. Bose*, in reply.—Reads the terms of the compromise. I submit that the order setting aside the compromise is final for it cannot be challenged in subsequent proceedings. The suit was for accounts and a preliminary decree was passed on the basis of the compromise. The High Court's order setting aside the compromise must be a decree as it reversed the preliminary decree and consequently it itself becomes a preliminary decree. It is, therefore, appealable. The case in *Saratmani Debi* v. *Bata Krishna Banerjee* (3) is distinguishable.

JUDGMENT.

Sanderson, C. J.—This is an application by the plaintiffs in the suit for a certificate that the case is a fit one for appeal to His Majesty in Council.

The suit was brought by the plaintiffs for partition by metes and bounds of the properties described in the plaint. During the course of the trial it was alleged that a compromise between the parties had been arrived at and an application was made on behalf of the plaintiffs to the learned Subordinate Judge for recording the compromise and for a decree in accordance with the terms of the compromise. The defendant Srimati Tarubala Dassi objected to the compromise being recorded and to a decree being passed, on the ground that the compromise had not been made with her authority. The learned Subordinate Judge heard evidence—both oral and documentary—and came to the conclusion that the compromise had been arrived at and was binding upon the parties. The learned Judge ordered the compromise to be recorded and made a preliminary decree in accordance therewith so far as it related to the suit.

The defendant then preferred an appeal to the High Court against the order recording the compromise and against the decree and the appeal was heard by my learned brothers Mr. Justice Walmsley and Mr. Justice Bepin Behary Ghose. These two learned Judges allowed the appeal and remanded the case to Trial Court in order that it might be heard from the stage at which it had reached on the 3rd September 1923.

It was argued on behalf of the plaintiffs that the decision of the Division Bench of this Court was a "decree" or a "final order" passed on appeal within the meaning of s. 109, cl. (*a*) of the C. P. C., and

that inasmuch as it reversed the decision of the Court immediately below and as there was no doubt that the value of the subject-matter in dispute in the suit and in the appeal was more than Rs. 10,000 the plaintiffs were entitled to a certificate. On the other hand, it was argued on behalf of the defendant that the order of the Division Bench was no more than an interlocutory order and did not decide the questions which were in dispute in the suit between the parties. There is no doubt that the decision of the Division Bench of this Court may be said to be a "final order" in the sense that it decided that the alleged compromise should not be recorded and that no decree should be made in accordance with the terms of the compromise. On the other hand, it is clear that the decision of the Division Bench of this Court did not decide any of the matters in controversy between the parties in the suit.

I have come to the conclusion that the order of the Division Bench of this Court remanding the case to the Trial Court must be regarded as an interlocutory order.

I refer to the case of *Alexander John Forbes* v. *Ameeroonissa Begum* (5). In that case a suit was brought by the plaintiff, who was a mortgagee, for possession of a *taluk* and other real estates, which had been mortgaged to him by deeds of absolute sale and defeazance, constituting a *bye-bill-wuffa*, or conditional sale in the nature of a mortgage. The case was tried by the Civil Judge of Purneah who made a decree for possession with the mesne profits which were claimed. The defendant appealed to the Saddar Dewani Adalat and that Court by its order, which was dated the 22nd January 1857, held that the Civil Judge had been wrong in decreeing *wasilat* or mesne profits and, further, that as the plaintiff had been found to have been in possession, he was bound, before he was entitled to have his conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and the Court remanded the case in order that the Judge might call upon the plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case accordingly went back to the Trial Court and the Acting Judge held that the accounts were insufficient and by his decree he dismissed the suit. Thereupon there was an appeal by the plaintiff to the Saddar Dewani Adalat and the Appeal Court dismissed the appeal. An application for review was made which, again, was dismissed, and there was an appeal by the plaintiff to the Judicial Committee of the Privy Council against the decrees dismissing the suit.

The part of the judgment which is material to the present case is with reference to the order of the 22nd January 1857 by which the Saddar Dewani Adalat remanded the suit for the purpose of a fresh trial. The judgment of Sir James Colville on this part of the case is at page 359* as follows:—"Upon the question whether the appellant is so bound by the order of the 22nd January 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of *Maharajah Moheshur Singh* v. *Bengal Government* (4) upon which their Lordships have very recently acted in a case from Oudh, the appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts."

On the principles which are there stated I am of opinion that the order of the Division Bench of this Court, remanding the case to the Trial Court for trial, must be regarded as an interlocutory order and it was not a "decree" or a "final order" passed on appeal within s. 109, cl. (*a*) of the C. P. C.

It was further argued by the learned Counsel on behalf of the plaintiffs that this Court should give a certificate under cl. (*c*) of s. 109 of the C. P. C. I have read the judgment of the Division Bench of this Court and I have no doubt that this is not a case in which this Court should grant a certificate under cl. (*c*) of s. 109 of the C.P.C.

For these reasons in my judgment this application must be dismissed. This decision governs the other application, so that both the applications are dismissed, with costs, five gold *mohurs* to cover both the cases.

*Page of 10 M. I. A.—[*Ed.*]

Rankin, J.—I agree. In this case the plaintiff sued for an ordinary partition decree. After written statement had been filed and at a time when the defendant was moving the Court to appoint a Receiver it is alleged that a settlement took place between the parties. The question of the shares of the parties seems to have given rise to no controversy, and the character of the alleged settlement seems to have been that the plaintiff would take over all the liabilities shown in the books, that the defendant would give up all rights to certain moveables, that she would have a right of residence in a certain house and that the jewellery would be divided in a certain way. The order from which it is proposed to appeal to His Majesty in Council is an order which merely holds that that settlement or adjustment has not been made out.

Now, an application to record an adjustment under O. XXIII, r. 3 is in some ways a very special matter because it is a matter as to which a party is allowed to stand upon and to enforce an agreement which was not in existence at the date of the suit. It is a method whereby for convenience a party is allowed to enforce what is really a new cause of action altogether and this is done in order to avoid the necessity of abandoning one suit and starting another. The question, therefore, whether a decision that the adjustment is invalid, is a final order or not is rather different from the question which can arise with regard to any other of the stages of the suit.

We have to decide whether in this case the order from which it is proposed to appeal should be regarded as merely negativing one way of deciding a controversy in the case or should be regarded as a decision upon a substantive cause of action negativing the cause of action and, therefore, in part finally determining the rights of the parties. We have to decide whether the order is a final order for the purpose of saying whether, under the Code, the right of a party is to appeal at once. It seems quite clear that if he has no right to appeal at once, the only consequence is that when this Court had determined the rights of the parties in the suit the present petitioner will be able to raise the question of the validity of the order which negatived the adjustment. I think the first principle to be kept in mind is what has been laid down by the late Mr. Justice Mookerjee in the very well-known case of *Secretary of State for India* v. *British India Steam Navigation Co.* (8): "Whether the character of finality can be rightly claimed in respect of an order must be determined with reference to the precise relation in which it stands to the proceeding before the Court." In my judgment, the mere dismissal of an application for recording an adjustment coupled with an order that it is, therefore, necessary for the case to be tried in the ordinary way does not stand in such a relation to the proceeding before the Court as to entitle it to be regarded as something which conclusively adjudicates upon the rights of the parties which were really the subject-matter of the litigation. It merely negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of.

The contention that the order must be final because it set aside a decree cannot be sustained.

I, therefore, think that the present application does not come within the phrase "final order" in s. 109 and I agree that there is no special case for giving a certificate on the principles applicable under cl. (*c*).

N. H. *Application dismissed.*

(8) 9 Ind. Cas. 183; 13 C. L. J. 90; 15 C. W. N. 848.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 731 OF 1923

May 12, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

Lala SHAGUN CHAND—PLAINTIFF—APPELLANT

versus

Lala ASA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 111—Partition—Question of title—Reference to Civil Court after framing of issues, legality of.

When objections based on a plea of title are taken during the course of partition proceedings in the Revenue Court, the Revenue Court must give the matter some consideration in its own mind as to what are the questions it will have to decide, and it must inevitably hear something of the matter before it comes to a decision as to whether it would enquire into the matter itself under sub-cl. (*c*) of s. 111 of the U. P. Land Revenue Act or whether it will refer it to the Civil Court under sub-cl. (*b*) of the section. There is nothing in the section to prevent the Court from

referring the matter to the Civil Court after it has gone to the length of framing issues. The issues are only a clear way of stating what is the question in dispute for determination. If, therefore, after the Court has gone as far as framing issues it becomes apparent to it that the question is of such complexity that it would not proceed to enquire into it itself, it is only common sense that it should refer the matter to the Civil Court and there is nothing in s. 111 opposed to this course. [p. 98, col. 2.]

Second appeal from a decree of the Additional Judge, Meerut.

Dr. *S. N. Sen* and Mr. *S. N. Gupta*, for the Appellant.

Dr. *K.N. Katju*, for the Respondents.

JUDGMENT.

Boys, J.—In this case there were certain partition proceedings in the Revenue Court, the applicants being defendants Nos. 1-5 in the suit before us. The plaintiff in the suit before us raised the question of proprietary title. On the 3rd of August 1921 the plaintiff was directed by the Assistant Collector to bring a civil suit. The present suit was the result. The fifth issue framed in the First Court was as to whether the Civil Court had jurisdiction, objection being taken by the defendants that the Assistant Collector had framed issues and decided to try them himself and had then changed his mind, and that he had no power to so change his mind. The Trial Court decided this issue and also all the other issues against the defendants and decreed the suit. The lower Appellate Court dismissed the suit on the preliminary point that the Revenue Court had no jurisdiction to change its mind and refer the matter to the Civil Court.

For the appellant here it is pointed out that the Revenue Court had not gone further than framing issues and fixing the date for final disposal, and that in fact no evidence or other enquiry was made. The lower Appellate Court has based its decision on the principle of the decision in the case of *Jamna Prasad* v. *Balmukand*, (1). That principle is that if the Revenue Court has once referred the matter to the Civil Court, it has no further power to deal with the matter at all until the matter has been decided by the Civil Court. The case was decided before the amendment of the law, but that is quite immaterial to the present case. The principle of that decision clearly was that the Revenue Court by having referred the matter to the Civil Court has become *functus officio* and has no further jurisdiction to touch the case. That principle is wholly inapplicable to the present case. It cannot possibly be suggested that even if the Revenue Court had no jurisdiction to pass the order complained against, that that jurisdiction was wanting because it was *functus officio*. It had no jurisdiction, the reason must be sought elsewhere.

For the respondents here it is again urged that the Revenue Court having once framed issues and fixed a date for final disposal, could not change its mind and refer the matter to the Civil Court. We do not agree. It is clear that when objections based on a plea of title are taken in the Reveuue Court, it must give the matter some consideration in its own mind, as to what are the questions it will have to decide, and it must inevitably hear something of the matter before it comes to a decision as to whether it would enquire into the matter itself under sub-cl. (*c*) or whether it will refer it to the Civil Court under an earlier sub-clause. There appears to us to be nothing whatever in the section to prevent the Court from referring the matter to the Civil Court after it has gone to the lengh of framing issues. After all the issues really are only a clear way of stating what is the question in dispute for determination. Further we think that such action is not prohibited in any way by any rule of common sense. If, after the Court has gone as far as framing issues, it becomes apparent to it that the question is of such complexity that it should not proceed to enquire into it itself, it is only common sense that it should then refer the matter to the Civil Court, and as we have said, we find nothing in s. 111 opposed to this course. For the respondents it was urged that if a reference to the Civil Court may be made at the stage at which it was in the present case, there is nothing to prevent the extension of the priniciple to permitting a Revenue Court to refer the case even after it has taken evidence. We should not be prepared to go as far as that. We think that the Revenue Court may be trusted to make up its mind at an early stage of the proceedings. For these reasons we think that the order of the Trial Court on this, preliminary objection was correct and that that of the lower Appellate Court was wrong.

Banerji, J.—I agree with my learned brother and I only wish to add that a suit

(1) A. W. N. (1904) 2; 26 A. 225.

for a declaration like the one in this case, is cognizable by the Civil Court, except where s. 233 (*k*) of the Land Revenue Act bars it. In this case the bar can be removed by the Revenue Court by an order under s. 111, cl. (*b*). I am of opinion that the order of the Revenue Court directing the present plaintiff to institute the suit was a removal of the bar and, therefore, the suit was entertainable.

By the Court.—The order of the Court is that the appeal is allowed and the order of the lower Appellate Court is set aside and the case is remanded to the lower Court for trial according to law. Appellant will get his costs including fees on the higher scale.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL NO. 5 OF 1925.

March 16, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.,

Kunwar JANG BAHADUR—JUDGMENT-DEBTOR—APPELLANT

versus

Lala BENI MADHO AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 39, 41—Execution of decree—Transfer of decree—Certificate, non-receipt of—Transfer to another Court, legality of.

Once a decree is transferred for execution to another Court under s. 39 of the C. P. C. the Court which passed the decree ceases to have jurisdiction till it receives a certificate under s. 41 of the Code from the Court to which the decree was transferred. An order by the Court which passed the decree transferring the decree for execution to a third Court before the receipt of the certificate under s. 41 of the Code from the Court to which the decree has already been transferred for execution is without jurisdiction and, therefore, a nullity.

Case-law referred to.

Appeal against an order of the Sub-Judge, Unao, dated the 20th November 1924.

Messrs. *H. D. Chandra* and *Krishna Bahadur*, for the Appellant.

Messrs. *D. K. Seth* and *P. D. Rustogi*, for the Respondents.

JUDGMENT.

Dalal, A. J. C.—The decree in this case was passed by the Court of the Subordinate Judge of Lucknow. On 6th April, 1921 the decree-holder applied under s. 39, C. P. C., for transfer of the decree for execution to the Subordinate Judge's Court at Hardoi. This application was granted on 11th April and proceedings in execution were taken in the Hardoi Court. Before a certificate of execution as required by s. 41, C. P. C., was sent by the Hardoi Court to the Court at Lucknow, the decree-holder applied to the Subordinate Judge's Court at Lucknow for transfer of the decree for execution to Unao and this was ordered on 3rd November 1922. Proceedings in execution were then carried on in Unao as well. The judgment-debtor, Jang Bahadur, made many objections there, which were dismissed. In none of these the question of jurisdiction of the Lucknow Court to transfer the decree to Unao was raised. On 14th November 1924, the judgment-debtor raised such an objection and it was dismissed by the learned Subordinate Judge of Unao.

This is an appeal from that dismissal. In my opinion once the Subordinate Judge's Court at Lucknow transferred the decree for execution to Hardoi, it ceased to have jurisdiction. I have given reasons for my opinion in *Mohammad Shakir* v. *Jugul Kishore* (1). The ruling of their Lordships of the Privy Council in *Maharajah of Bobbili* v. *Narasaraju Peda Sinhula* (2) cannot be interpreted in any other way. I was confronted by the respondent's learned Counsel with another decision of mine of 1921 [*Kunwar Behari Lal* v. *Girdhari Lal & Damodar Das*, Execution of Decree Appeal No. 25 of 1921, decided on 2nd August.] At that time I had not properly considered the effect of the Privy Council ruling. In *Muhammad Habibullah* v. *Tikam Chand* (3) to which I was a party, it was observed in the judgment that once a decree is transferred under s. 39, C. P. C., the Court which passed the decree ceases to have jurisdiction till it receives a certificate under s. 41. I adhere to that view of the law. A recent Patna ruling: *Ram Sumran Prasad* v. *Ram Bahadur* (4) was quoted

(1) 85 Ind Cas. 455; 1 O. W. N. 794; 10 O. & A. L. R. 1277; 28 O. C. 169.

(2) 36 Ind. Cas. 682; 39 M. 640; 43 I. A. 238; 31 M. L. J. 300; 18 Bom. L. R. 909; 11 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.).

(3) 85 Ind. Cas. 746; 47 A. 57; L. R. 6 A. 103 Civ.; (1925) A. I. R. (A.) 276.

(4) 71 Ind. Cas. 741; 2 Pat. 328; 4 P. L. T. 99; (1923) Pat. 61; (1923) A. I. R. (Pat.) 224.

by the respondent's learned Counsel. There, however, no question of jurisdiction arose. What a Bench of that Court held was that two concurrent applications for execution can be prosecuted in the Court which passed the decree. In the same volume at page 247* the case of *Jnanendra Nath Ghosh* v. *Jogendra Narain Sinha* (5) is reported, in which the Privy Council ruling of *Maharajah of Bobbili* v. *Narasaraju Peda Sinhula* (2) was interpreted in the way in which I have interpreted it.

I would decree the appeal and set aside all proceedings taken by the Lucknow and Unao Courts consequent on the application for execution filed by the decree-holder in the Court of the Subordinate Judge of Lucknow on 15th January 1922. I would, however, not allow any costs to the appellant-judgment-debtor, who has not my sympathy in the obstacles he has placed for years in the way of paying just debts to his decree-holder.

Wazir Hasan, A. J. C.—I agree.

Z. K. *Appeal decreed.*

(5) 74 Ind. Cas. 608; 2 Pat. 247; (1923) A. I. R. (Pat.) 384; (1924) Pat. 362.

*Page of 2 Pat.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1576 OF 1922.

February 18, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

SUBASHINI DASI—PLAINTIFF—APPELLANT

versus

HABU GHOSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 2—Abatement of suit—Hindu Law—Joint family—Manager, alienation by—Benefit of family.

A Hindu widow sued her husband's brothers for declaration of title to and possession of her share in certain joint family property, and also for a declaration that a lease of a portion of the property given by one of the brothers was not binding on her. The lessees were joined as defendants. The plaintiff obtained a decree but was refused *khas* possession of her share in the property covered by the lease, the lease being held to be valid. She appealed against this portion of the decree. During the appeal one of the brothers died and his representatives were not substituted within time:

Held, that the question in appeal being confined to whether the lessees were entitled to remain on the land or not, the heirs of the deceased brother were not interested in the result of the appeal, and that, therefore, the appeal had not abated. [p. 101, col. 2.]

The mere fact that a certain person is the manager of a Hindu joint family is not enough to make his acts binding upon the other members of the family; and it must be shown by the party relying upon the acts of the manager and seeking to bind the other members of the family, that the acts were done by the manager either for the benefit or for some interest of the family. [p. 102, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, First Court, 24-Parganas, dated the 10th March 1922, modifying that of the Munsif, First Court, dated the 6th April 1920.

Babu *Rupendra Kumar Mitra*, for the Appellant.

Babu *Karunamoy Ghose*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.

Mukerji, J.—The plaintiff is the appellant in this appeal. She is the widow of one Preonath Ghose. Preonath, Gokul and Sahadeb were three brothers. The plaintiff instituted the suit out of which this appeal arises, impleading therein the two brothers Gokul and Sahadeb, their mother and certain other persons, who, for the sake of convenience, will be called the Kola defendants. The suit was for declaration of plaintiff's title to the 16-annas of the land mentioned in schedule *ka* of the plaint on the allegation that the said land had been acquired by her husband Preonath, after he had separated from his brothers, Gokul and Sahadeb. It was also for a declaration of her one-third share in the land mentioned in schedule *kha* of the plaint and for recovery of possession thereof on partition by metes and bounds on the allegation that her husband had the said share in the said land which belonged to the joint family of which the three brothers were the members. She also prayed for a declaration that the lease which had been granted by Sahadeb in favour of the Kola defendants in respect of some of the lands included in schedules *ka* and *kha* was fraudulent, and collusive and not binding upon her, and she, therefore, prayed for a decree for *khas* possession in respect of those lands, for mesne profits, accounts and other relief. The Munsif decreed the plaintiff's suit in part declaring her right to the 16-annas of the properties mentioned in schedule *ka* and also declaring her right to an undivided one-third share of the properties mentioned in Schedule *kha* and awarding her

a decree for possession in respect of the said one-third share on partition to be effected by a Commissioner to be appointed for the purpose. As regards the lease, Ex. A, the Munsif held that the said lease was unauthorized and not binding on the plaintiff. He gave the plaintiff a decree for *khas* possession in respect of the land of schedule *ka* but in respect of the land of schedule *kha* he held that she was entitled to partition only and not to a decree for possession as there was no evidence that the defendants had dispossessed her from any particular portion of it. He awarded her a decree for mesne profits in respect of the lands of schedule *ka* and gave her liberty to bring a separate suit for future mesne profits and accounts.

The defendants thereupon preferred an appeal and the learned Subordinate Judge on appeal declared the plaintiff's title to an 8-annas share in the lands of schedule *ka* and to a third share in the lands of schedule *kha* and also awarded her a decree for possession by partition of those shares by metes and bounds; and he further ordered that there should be no decree for *khas* possession in respect of the lands covered by the lease Ex. A. As the said lease was not fraudulent or collusive and as the Kola defendants had *bona fide* obtained the lease from Sahadeb in their favour. He also set aside the decree for mesne profits.

The plaintiff thereupon has preferred this appeal to this Court. The appeal is confined to the lands covered by the lease Ex. A, it being contended that the findings arrived at by the learned Subordinate Judge are not sufficient to disentitle the plaintiff to a decree for *khas* possession in respect of the lands covered by the lease Ex. A. It is urged that some of the findings arrived at by the learned Munsif on this question have not been touched or reversed by the learned Subordinate Judge and that it is necessary that the matter should be sent back to the learned Subordinate Judge in order that he may arrive at proper findings and pass a proper decree.

A preliminary objection has been taken on behalf of the respondents as to the maintainability of this appeal. It is urged that one Kunja Ghose who was one of the minor sons of Gokul and was so made a party respondent in the appeal died more than two years ago, and that his heirs have not been substituted in his place; and it is contended that in the absence of substitution of the heirs of Kunja, the appeal is not maintainable. Gokul Ghose, as I have already said, was one of the defendants in the suit, and when the suit was pending in the Court of the learned Munsif, he died and thereupon his four sons, Habu Ghosh, Purna Ghose, Ambica Ghose and Kunja Ghose were substituted in his place. These sons of Gokul together with the heirs of Sahadeb and the Kola defendants preferred an appeal from the decision of the Court of first instance; and Kunja was made a respondent in the appeal before us, when the same was originally preferred. On the other hand it is contended on behalf of the appellant that the appeal is maintainable, although there has been no substitution of the heirs of Kunja. It is urged that the present appeal is confined to the question as to whether the lease Ex. A, is binding upon the plaintiff. It is also urged that the decree passed by the lower Appellate Court in so far as it purports to declare plaintiff's title to an 8-annas share in the lands in schedule *ka* and a third share in the lands in schedule *kha*, or in so far as that decree entitles the plaintiff to a partition of those shares will not be affected by the result of this appeal. So far as the lands of schedule *ka* are concerned, upon the findings of the two Courts below it is clear that the heirs of Gokul are not in any way interested therein. As for the lands of schedule *kha*, the plaintiff is interested to the extent of a third share of those lands and it may very well be that the heirs of Gokul are interested in some share in the remaining two-thirds. The scope of the present appeal, however, is confined to the question as to whether the Kola defendants are entitled to remain on the land by virtue of the lease which had been granted to them by Sahadeb. It does not, therefore, appear to us that the heirs of Gokul are in any way interested in the result of this appeal; and, therefore, we are not prepared to say that the appeal is not maintainable in the absence of the heirs of Kunja who is dead and whose heirs have not been substituted in his place.

Turning now to the contentions which have been put forward on behalf of the appellant, they amount to this that the findings of the learned Subordinate Judge are not sufficient to dispose of the matter. The plaintiff's case, as laid in the plaint,

was to the effect that Sahadeb in collusion with the Kola defendants fraudulently executed a lease in their favour in order to deprive the plaintiff of these lands and that the lease was merely a paper transaction which had not been acted upon. The learned Munsif found that in the document Sahadeb completely ignored the right of the plaintiff and described the entire land as his own ancestral *mourasi mokarrari niskar* land and that the lease, therefore, was one which had been executed by Sahadeb in denial of the plaintiff's right; and in that view of the matter he held that it was a fraudulent and collusive document which is not binding upon the plaintiff. The learned Subordinate Judge has found in his judgment that Sahadeb was, at the time when he executed the lease, managing the properties of the plaintiff and that the Kola defendants *bona fide* obtained the lease in respect of the lands and came to be in possession thereof. He found that the transaction was not fraudulent or collusive. He recorded a further finding to the effect that Sahadeb executed the lease on behalf of himself and the plaintiff. On what basis the last finding was made it is not very clear, for the document itself shows that it purported to have been executed by Sahadeb alone for himself; and not only that, he expressly stated in the document that the property was his own *mourasi mokarrari niskar* land. The question is whether these findings are sufficient for the purpose of holding that the Kola defendants are entitled to remain on the land, or, in other words, whether the lease, under the circumstances, can be said to be binding as against the plaintiff. Taking the findings of the learned Subordinate Judge at their highest they mean that Sahadeb executed the document as the manager of the joint family and that the Kola defendants *bona fide* obtained the lease from Sahadeb and came to be in possession of the land by virtue of the lease. This finding, in our opinion, is not sufficient for the purpose of holding that the lease was binding on the plaintiff. The mere fact that a certain person is the manager of a joint family is not enough to make his acts binding upon the other members of the family and it must be shown by the party relying upon the acts of the manager and seeking to bind the other members of the family, that the acts were done by the manager either for the benefit or for some interest of the family. It is true that the case put forward in the plaint was to the effect that the document was a fraudulent and collusive document and one which had not been acted upon. This case, no doubt, may be taken to have been disposed of by the finding of the learned Subordinate Judge. This finding, however, does not seem to us to be sufficient for the purpose of the case. To hold that the plaintiff was bound by the transaction it must be found that it was for the benefit of the family or for some interest of the family. Such a finding is all the more necessary in the present case in view of the fact that there is nothing to show that the plaintiff was aware of the transaction when it was made, and it has been proved that she was a young widow living under the care of Sahadeb.

There is a further matter which appears upon the defence set up by the Kola defendants. The lease was for a period of three years which has expired long ago. In their written statement they alleged that they were the settled *raiyats* of the village for a series of years before they came to be in possession of this particular land by virtue of the lease and that after they had come to be in possession of this land, they acquired a right of occupancy therein. It is necessary, therefore, that there should be a finding recorded by the learned Subordinate Judge on the question as to whether the Kola defendants by virtue of their status have acquired such rights as would entitle them to remain on the land in spite of the fact that the lease may not be binding upon the plaintiff.

We think, therefore, that the decree of the learned Subordinate Judge passed in this case should be set aside and the matter should go back to him in order that he may arrive at his conclusions upon the two questions set out above.

In the event of both the questions being answered in her favour, the plaintiff will be entitled to a decree for *khas* possession of the lands allotted to her by evicting the defendants therefrom. In the event of the first question only being answered in her favour she will be entitled only to a declaration that the lease is not binding on her. In other cases the decree passed by the lower Appellate Court will stand.

It will be open to the learned Subordinate Judge to allow the parties to adduce

further evidence if he thinks fit but the rest of the decree already passed in the suit by the Court of Appeal below will not be allowed to be re-opened and the learned Subordinate Judge will dispose of the case finally in accordance with the direction given above.

Costs of this appeal will abide the result.

Greaves, J.—I agree.

N. H. *Appeal allowed; Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1060 OF 1923.

April 6, 1925.

Present :—Mr. Justice Sulaiman and Mr. Justice Mukerji.

Munshi SHIB RAM—PLAINTIFF—APPELLANT

versus

FAQIRA—DEFENDANT AND ANOTHER—PLAINTIFF—RESPONDENTS.

Pleadings—Pleadings and proof, variance between—Ejectment suit based on allegation of tenancy—Tenancy not proved—Decree, whether can be granted on basis of title.

Plaintiff brought a suit to eject the defendant from a certain house on the allegation that the defendant was a tenant of the plaintiff and that the tenancy had been determined. Defendant pleaded that he held the house not from the plaintiff but from one *D*. It was found that the defendant's allegation was correct. *D* was not a party to the suit ;

Held, that in the suit as framed the plaintiff having failed on the question of tenancy could not be allowed to prove title and obtain a decree on the basis of title especially as *D* was not a party to the suit. [p. 104, col. 2.]

Second appeal from a decree of the District Judge, Saharanpur, dated the 27th March 1923.

Referring Order.—This is a case involving a very important point of principle and should be decided by a Bench of two Judges at least.

One of the plaintiffs is the appellant in this Court. The plaintiffs brought the suit, out of which this appeal has arisen, on the allegation that they were the owners of a certain house and its appurtenant buildings, that they let out a portion of that house and building to the respondent, the defendant in the case, on a rent of Rs. 5 per-mensem, that the defendant paid only a part of the rent due, that a notice to quit was served on the defendant and that he had failed to vacate the portion occupied by him. The plaintiffs accordingly sued to recover the arrears of rent and a small amount as damages or mesne profits. The plaintiffs brought their suit on a Court-fee, calculated at Rs. 60, *viz.* a year's rent, under the provisions of sub-cl. (*cc*), cl. *xi* of s. 7 of the Court-Fees Act. They valued their suit at Rs. 60 so far as the claim for possession went.

The defence was that the defendant did not hold the property under the plaintiffs but he held it from one *Musammat* Durgi. He stated in his written statement that *Musammat* Durgi was a necessary party to the suit.

The learned Subordinate Judge framed four issues and the first one of these was 'whether the plaintiffs or *Musammat* Durgi owned the house'. The second issue was 'whether the defendant rented the house from the plaintiffs or *Musammat* Durgi'? If so, at what rate of rent ?

The learned Subordinate Judge did not decide Issue No. 1 and on Issue No. 2 he held that the letting alleged by the plaintiffs had not been proved. On the question whether *Musammat* Durgi should be impleaded the learned Judge was of opinion that it was not necessary to implead her. On these findings the learned Subordinate Judge dismissed the suit.

On appeal the learned District Judge upheld the findings of the Court of first instance and dismissed the suit. He considered the question whether it was open to the plaintiffs to say that they had a title to the house and although the alleged tenancy was not proved they were entitled to recover possession on foot of their title. The learned Judge came to the conclusion that it was not open to the plaintiffs to shift their ground and to eject the defendant as a trespasser.

In this Court it has been urged that there was nothing in law to debar the plaintiffs from proving their title and getting a decree for ejectment all the same. It is pointed out that there was an issue on the question of title, *viz.*, whether the plaintiffs or *Musammat* Durgi owned the house. It is urged for the appellant that this issue should have been tried. As regards the fact that the suit was brought as a suit between landlord and tenant on a small Court-fee it is pointed out that the Court Fees Act is a purely fiscal enact-

ment and it cannot take away the right of a party to the relief to which he might be otherwise entitled.

On the other hand, it is urged that the plaintiffs have paid a small Court-fee, that they did not make *Musammat* Durgi a party, that they deliberately chose to frame their suit as one between a landlord and a tenant and that these considerations were sufficient for dismissal of the suit on the simple ground that the tenancy had not been proved.

It will be noticed that the point raised is one of general importance. Every day suits are brought on the allegation that a certain person occupying a certain property is a tenant of the plaintiff and has refused to quit in spite of the tenancy having come to an end. So far as I am aware the decisions are not at all uniform as to whether a decree should be granted to the plaintiff on foot of his title on his failure to prove the tenancy set up by him.

It is not clear whether, if a plaintiff who brings his suit on an allegation of tenancy fails in it he will be allowed to maintain a fresh suit for ejectment without an allegation of tenancy. There does not appear to be any rule of law which can permit the filing of a second suit. So far as I can see at present, the Courts which will have jurisdiction in both the cases will be the same and the right of appeal up to the highest Court in the land would be open in both cases. If then a second suit without an allegation of tenancy be barred, it would be unfair to the Court to stop the plaintiff from succeeding simply because he had failed to prove an allegation of tenancy. The question of Court-fee can easily be settled by giving the plaintiff an opportunity to pay the proper amount.

In this particular case as I have already mentioned there was a distinct issue on title and that has not been decided.

The question, as already stated, is one of great importance to house owners and so far as I am aware there is no clear authority on either side. This case is sure to go before two Judges on a Letters Patent Appeal. It would save trouble and expense if it be heard by two Judges at once.

Mr. *Durga Prasad*, for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—The fact of the case will sufficiently appear from the Referring Order of one of us. The question raised and to be discussed was whether the plaintiffs' suit having failed on the allegation of tenancy could succeed on title. This question was decided in the affirmative in the particular circumstances of that case in *Balmakund* v. *Dalu* (1). This case, however, is slightly different from that case. Further, it appears that after the decision of this case an amending Act was passed by which a landlord was allowed to sue for ejectment of an alleged tenant on payment of a smaller Court-fee than would be required to eject the defendant as a mere trespasser.

This case is further differentiated by the fact that the defendant in this case pleaded that he was holding as a tenant not from the plaintiffs but from one *Musammat* Durgi. The Court of first instance distinctly held that the defendant had proved his case. The lower Appellate Court, as we understand its judgment, is also of the same opinion. *Musammat* Durgi is not a party to this litigation. It has been further found that *Musammat* Durgi is in possession. It follows that in this suit the plaintiffs cannot get a decree for ejectment without impleading *Musammat* Durgi and seeking to eject her. She is not a party and the plaintiffs will have to bring a suit against *Musammat* Durgi in all circumstances. The fear that was expressed in the Referring Order was that a second suit might be barred as *res judicata*. But the second suit in the present case will very likely be against *Musammat* Durgi as the defendant claims under her on the findings on the Courts below.

In our opinion there is no reason to allow the plaintiffs either to amend the plaint or to implead *Musammat* Durgi.

We dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 25 A. 498; A. W. N. (1903) 112.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1 OF 1925.

January 27, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

Rais JAN MAHOMED AND ANOTHER —APPELLANTS

versus

Rais GHULAM RASUL KHAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—

Receiver, appointment of, principles governing—Appointment of party as Receiver, when justified.

The Court is competent to appoint a Receiver in a pending partition suit between co-owners and co-sharers for the protection of the property in suit or the prevention of an injury to such property. [p. 106, col. 1.]

A plaintiff asking for the appointment of a Receiver must prove that *prima facie* he has an excellent chance of succeeding and that the property in the possession of the opposite party is in danger of being wasted. [p. 106, col. 2.]

Govind Narain Rao v. *Vallabhrao*, 55 Ind. Cas. 827; 22 Bom. L. R. 217, relied upon.

A Court will not appoint a party to the suit to act as a Receiver unless by consent or unless there are special circumstances justifying such an appointment. [p. 106, col. 1.]

In re Lloyd, Allan v. *Lloyd*, (1879) 12 Ch. D. 447; 41 L. T. 171; 28 W. R. 8, relied upon.

Appeal against an order of the First Class Sub-Judge, Hyderabad (Sind).

Mr. *T. G. Elphinston*, for the Appellants.

Mr. *Kimatrai Bhojraj*, for the Respondents.

JUDGMENT.—This is an application for *interim* stay of the order passed by the First Class, Sub-Judge, appointing a Receiver in a pending partition suit among Muhammadan co-sharers. The appeal is not ripe for hearing. We have heard the chief contesting parties on the affidavits filed by them and on such of the certified copies of the lower Court's record as have been placed before us.

The main facts are not in dispute. The subject-matter of the suit are certain vast and extensive agricultural lands yielding an annual income of over four lacs of rupees a year belonging to the late K. B. Wali-Mohamed Bhurgri, who died in 1891. Some other properties subsequently acquired by his sons jointly or some of them exclusively on their own account are possibly also the subject-matter of this suit, though there is some dispute about this point.

The appellants (original defendants Nos. 1 and 2) are the sons of the Khan Bahadur from his second wife and their share in the estate is 7 annas 9 pies in the rupee.

From his first wife *Musammat* Bhagbhari (respondent No. 3) the Khan Bahadur left two sons Rais Ghulam Mahomed Bhurgri, who died in March 1924, and Mahomed Usman, who died in 1905. He also left three daughters from the same wife. Two of the daughters filed a suit for their share in the estate about sixteen years ago. They were met by the plea that according to the custom prevailing in this family, women were excluded from inheritance. According to the affidavit of appellant No. 1, the two sisters withdrew their case on receiving Rs. 10,000 in addition to the expenses incurred on their marriage, and are no longer interested in the property in suit. The third daughter, *Musammat* Fatma, has not been made a party to this suit. Rais Ghulam Mahomed Bhurgri left three sons, Abdul Kayum and the respondents Nos. 1 and 2 (original plaintiffs) and four daughters, respondents Nos. 4 to 7, of whom respondent No. 4 is an adult and the other daughters are minors.

Abdul Kayum died in October 1924. Whether the claims of the females to the inheritance are barred by this alleged custom. or whether the claims of Bhagbhari and Fatma have by now become stale is another matter, but the total shares of this branch of the family in the estate is 8 annas 9 pies in the rupee.

From 1891 upto March 1924 the estate was under the management and control of Rais Ghulam Mahomed Bhurgri, and probably the appellants helped him on certain occasions.

Between March and October 1924 the parties talked of a partition, but their disputes became more acute after Abdul Kayum's death as by then the time for reaping the harvest had arrived.

There is generally very little work for the manager to do, before the time for *batai* or division of the crop between the *haris* or the tenants and the manager. At the time of *batai*, which generally takes place between November and January, the manager not only recovers and disposes of in the market the *zemindari* share but takes over practically the whole of the share of the tenants either in re-payment of the advances made to the tenants or by purchase at a price to be settled between them. The manager wields any amount of authority and power at this time of the year and unless he is careful and honest, he may cause irreparable loss to the co-owners.

According to respondents Nos. 1 and 2. Abdul Kayum, and after his death his brother respondent No. 1, retained effective control over the lands, and as usual advanced over a lac of rupees to the *haris*, and as he was being disturbed in the management, they instituted this suit for partition. They prayed further for appointment of a Receiver, and pending notice of the receivership application they obtained an *ad interim* injunction without notice re-

straining the appellants from interferring with their possession and control. The appellant No. 1, was however, able to induce the Court to appoint him as *interim* Receiver and to discharge the injunction pending the disposal of the receivership application. At the final hearing of the receivership application the Court passed an order appointing the Deputy Collector of that place as Receiver of the property in suit in place of the appellant No. 1, and this last order is the subject-matter of the present appeal and of the application for stay.

Mr. Elphinston who appears for the appellants has been unable to satisfy us on the materials now before us that the order of the lower Court is either improper or that unless it is stayed it will result in serious prejudice to the appellants. It is now well settled that the Court is competent to appoint a Receiver in a pending partition suit between co-owners or co-sharers for the protection of the property in suit or the prevention of an injury to such property.

It is further well settled that if a case for the appointment of a Receiver is made out, the Court will not appoint a party to the action as Receiver unless by consent or unless there are special circumstances justifying such appointment. Halsbury's Laws of England, Vol. 24, para. 674. There can be no doubt that this was a fit case for the appointment of a Receiver. Rais Ghulam Mahomed who had the confidence of all the parties and who managad the estate upto March 1924 was dead. Such little work as was required to be attended to during the cultivation season was very probably looked after by the numerous *kamdars* and clerks who worked during the lifetime of Rais Ghulam Mahomed. According to respondents Nos. 1 and 2, Abdul Kayum advanced over a lac of rupees to the *haris* during the interval. Possibly the appellant has also incurred certain expenses. Whether Abdul Kayum, and after his death respondents Nos. 1 and 2 retained effective control and management of the property or not, there can be no doubt that it was essential that a Receiver should be appointed to prevent the unseemly scramble over this year's crops, its unnecessary waste, and possibly the breaking of heads of the *haris* who favoured and supported the possession of one side or the other.

Mr. Elphinston has drawn our attention to the case of *Govind Narain Rao* v. *Vallabhrao* (1). As observed by Sir Norman Macleod at page 218*, there is no doubt that a plaintiff asking for the appointment of a Receiver must prove that *prima facie* he has an excellent chance of succeeding and that the property in the possession of the opposite party is in danger of being wasted. In that case the plaintiff's right to a share in the business carried on by the defendant for several years, was denied. This business seemed to be the chief item in respect of which the Receiver was being sought. The agricultural holdings which were the subject-matter of the suit, were not extensive and were also admittedly in the possession of the defendant.

The right of respondents Nos. 1 and 2 to a certain share is not disputed, and till recently the father of respondents Nos. 1 and 2 and not the appellants had the effective management and control of the property. *Govind's case* (1) has, therefore, no application.

The appellants themselves considered it necessary to have an *ad interim* Receiver appointed, and the Court was justified in making the Rule absolute, though it thought fit to substitute a disinterested person as a Receiver in place of appellant No. 1. Mr. Elphinston has urged that the appellant No. 1 is a member of the Legislative Council and a fit person to act as a Receiver and that the appointment of a stranger is a slur on him. He has also attacked the *bona fides* of this suit and the receivership application on the ground that it has been inspired by certain evil minded persons who have control over respondent No. 1, who is said to be a youth 18 years old. Respondent No. 1 has, on the other hand, challenged the business capacity of the appellant to act as Receiver, has urged that he is a debtor to the estate, and the cause of the whole dispute, having refused to partition the share of his branch of the family leaving the males and the females of the other branch to settle their scores.

We are not at present concerned with the causes which have led to this suit or the merits and the demerits of appellant No. 1 to act as Receiver. *Prima facie* the appellant being a party to the suit could not act as a Receiver. It was within the discretion of the lower Court to appoint him as Receiver only if special circumstances existed to warrant such appointment. His being a

(1) 55 Ind. Cas. 827; 22 Bom. L. R. 217.

*Page of 22 Bom. L. R.—[*Ed.*]

member of the Legislative Council or his dignity being offended can hardly be said to be such special circumstances within the rule contemplated by Sir Jessel, M. R., *In re Lloyd Allan* v. *Lloyd* (2). The fact that the Receiver appointed in the case was a member of the firm of Solicitors and was interested only in his capacity as such does not seem to have been urged as a good ground for his retention. The power of this Court to interfere with the discretion exercised by the lower Court is limited.

It has been further urged on behalf of the respondents and very rightly, that such possession as they had at the date of this suit has been disturbed by the appellant No. 1 getting himself appointed as *interim* Receiver and the appellants have, therefore, by their conduct made it impossible for the Court to order *interim* stay the effect of which would be to continue him in possession and to oust the respondents from their possession.

Certain technical objections were raised by the learned Counsel for the appellants which require but a passing notice. The fact that *Musammat* Fatma is not a party to the suit cannot affect the jurisdiction of the Court to appoint a Receiver. She was never in actual possession of the estate and, therefore, is not being disturbed from her possession. This defect can easily be cured by her joinder without prejudice to the contention of the respondents Nos. 1 and 2 that she has no claim to the property and that her claim, if any, is Statute barred.

The ground that the application was for the appointment of Receiver of the standing crop or of this year's crop and not of the property in suit is again, if borne out by the record, too technical. The Court was competent to appoint a Receiver of the property in suit and has done so. If there was any technical defect in the drafting of the application, it has not prejudiced any party.

No grounds have been urged against the Deputy Collector, who is a high Government Official having no interest in either party acting as a Receiver and may savely continue to act pending this appeal.

As stated above we are not at present satisfied that the order of the lower Court is so improper or that the appellants will be seriously prejudiced as to warrant our staying the order of the lower Court at this stage.

(2) (1879) 12 Ch. D. 447; 41 L. T. 171; 28 W. R. 8.

Without limiting our right to vacate the order of the lower Court or to modify it by appointing some other person as Receiver or as joint Receiver after all the parties are properly before us, we order that the application for *interim* stay of the lower Court's order be dismissed with costs, and that the Receiver do proceed to manage the estate pending the disposal of this appeal. The appeal should be fixed for hearing at an early date.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 248 OF 1924.

April 20, 1925.

Present:—Mr. Ashworth, A. J. C.

Munim SHER KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MISRI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54, 90, 92—Execution of decree—Sale confirmed—Suit to set aside sale, maintainability of—Fraud, proof of—Property sold at low price—Presumption—Notice of sale.

The fact that the property put up to sale at an auction in execution of a decree has fetched a price smaller than its value does not raise a presumption of fraud.

Where an auction-sale has been confirmed a suit cannot be maintained by the judgment-debtor to set aside the sale on account of fraud.

No notice other than the publication of the sale proclamation in the manner provided for by r. 54 of O. XXI of the C. P. C. is required by law to be given of an intended auction-sale.

Second appeal from an order of the Subordinate Judge, Unao, dated the 29th February 1924, confirming that of the Munsif, Safipur, District Unao, dated the 30th October 1923.

Mr. *A. P. Nigam*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This second civil appeal arises out of a suit to set aside a sale held in execution of a decree passed against the plaintiffs on the ground of fraud. The fraud alleged in the plaint is that the defendants after getting plaintiff's share proclaimed for sale fraudulently and cunningly tried to stop purchasers from coming on the date fixed for sale. No attempt has been made to support this allegation. The

fact that the property may have fetched a smaller price than that it was worth raised no presumption of fraud. It is alleged that the plaintiffs did not get notice of the sale. Apart from the fact that no notice other than the publication of the sale proclamation in the manner provided for by O. XXI, r. 54 is required by law it is proved that this allegation of the plaintiffs is false as he has actually signed the sale proclamation certificate. Apart from the merits of the case both the lower Courts have pointed out that under O. XXI, r. 92 no suit for setting aside the sale would lie inasmuch as the Court had made an order confirming the sale.

The appeal is, therefore, dismissed with costs.

The certificate that the grounds for second civil appeal were good have been signed by Puttoo Lal Pleader. He has not appeared to support the appeal and it would appear to me that the certificate is a false one and that any Pleader of this Court should have known that the grounds were not good.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 366 OF 1924.

February 17, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

THE VIRAMGAM SPINNING MANUFACTURING COMPANY, LIMITED—APPELLANT

versus

THE INDUSTRIAL BANK OF WESTERN INDIA, LIMITED—RESPONDENT.

Companies Act (VII of 1913), ss. 153, 202—Schemes of reconstruction—Order made on application of Company—Appeal, whether lies.

It is only when an order is made under s. 153 of the Companies Act in the course of a liquidation by the Court, that an appeal lies against the order under s. 202 of the Act. An order made under s. 153 on the application of the Company itself which is not in the course of being wound up is not appealable.

First appeal against the decision of the District Judge, Ahmedabad, in Miscellaneous Appeal No. 134 of 1924.

Mr. *Binning* (with him Mr. *Ratanlal Ranchhodas*), for the Appellant.

Mr. *G. N. Thakur* (with him Mr. *M. K. Thakore*), for Respondent No. 1.

JUDGMENT.—We think that this appeal is not competent as the order was made by the District Judge, not in the winding-up of the Company, but on the application of the Company itself. There are two classes of orders which can be made under s. 153 of the Indian Companies Act, the first, while the Company is in existence, which can be made on an application either by the Company or by a creditor or by a member of the Company, the second after a winding-up order has been made, which can be made on an application by the liquidator. It is only if the order is made in the course of the liquidation by the Court that an appeal lies under s. 202 of the Act. As this order was made on an application by the Company, which is not in the course of being wound-up, there is no provision in the Act which provides for such an order being appealable. The appeal, therefore, must be dismissed with costs in favour of respondent No. 1.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 42 OF 1924.

May 27, 1925.

Present:—Mr. Simpson, A. J. C., and Mr. Gokaran Nath Misra, A. J. C.

Bibi JAI KISHORI—PLAINTIFF—APPELLANT

versus

Nawab ALI AHMAD KHAN *alias* SHAHENSHAH BAHADUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Deed executed by minor representing himself to be major—Burden of proof—Muhammadan Law—Shia Law—Age of puberty, what is—Marriage contracted by father—Option of puberty—Appeal—Oral evidence, estimate of—Trial Court, opinion of, value of—Age—Statement by woman as to her age, value of.

When a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him, or his representatives, when they set up the defence of minority. It is not enough that they leave the matter in doubt. They must satisfy the Court beyond reasonable doubt that the minority is a fact. [p. 109, col. 2.]

Under the Shia Law nine is regarded as the age of puberty for a female, but there is no authority for regarding nine as the age of discretion and a girl of nine would never be allowed to contract herself in marriage. Under the Muhammadan Law there is no option of puberty when a girl is contracted in marri-

age by her father anymore than when she contracts herself. [p. 112, cols. 1 & 2.]

Where a Trial Court records its opinion, from observation of a witness in Court, as to the credibility or otherwise of the witness, the Appellate Court would attach great weight to such opinion. [p. 112, col. 2.]

It is not to be expected that a lady would be absolutely accurate in stating her age, whether in conversation or in a formal document. Very few ladies really know their own ages accurately and they have a natural desire to wish to be thought younger than they are. [p. 113, col. 1.]

Appeal from a decree of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 30th April 1924.

Messrs. *Niamat Ullah* and *M. L. Tewari*, for the Appellant.

Messrs. *Ghulam Hasnain Naqavi*, *M. Wasim* for Messrs. *A. P. Sen*, *H. K. Ghosh*, *G. D. Khare*, *Abid Husain*, *Haider Husain*, and *Salig Ram*, for the Respondents.

JUDGMENT.—This is a first appeal. The plaintiff, Bibi Jai Kishori, is the appellant. The suit is one to recover Rs. 32,632-7-9, principal and interest on the basis of a simple mortgage-deed for Rs. 7,000, dated 13th April 1908, repayable in five years with compound interest at 14 annas per cent. per month, with half-yearly rests. The mortgagors were two brothers Baqar Ali Khan and Ali Ahmad Khan. Their father, now deceased, was Kasim Ali Khan, and their mother, now deceased, was *Musammat* Rais-un-nisa. There was a daughter younger than these two, named Askari Begam. She is defendant No. 5. And there was a fourth child, the youngest, Jafar Ali Khan, Baqar Ali Khan is dead. The first defendant is Ali Ahmad Khan, one of the mortgagors but he has sold the whole of his interest to defendant No. 6 on 19th December 1921 for Rs. 25,000. Defendants Nos. 2 to 4 are the heirs of Baqar Ali Khan. Defendant No. 5 has pleaded that the property in her possession was not included in the mortgage-deed and that she is a *bona fide* purchaser for value from an ostensible owner. Defendant No. 7 Amjad Ali Khan is a brother of Kasim Ali Khan and is thus an uncle of the mortgagors. He sets up a title paramount to the mortgage.

The main defence raised in the suit was that the mortgagors were minors at the time when the deed was executed, and that the contract is accordingly void. This contention was upheld in the Court of Trial. For the plaintiff it was urged that even if the mortgagors were in fact minors, they fraudulently represented themselves to be majors, and were estopped from raising the plea of minority now. The learned Subordinate Judge held that, although there was fraud, the minors themselves were not parties to the fraud, which was the act of their father, and that, therefore, there was no estoppel.

We do not propose to decide the question of law. We find that the defence has failed to prove that the mortgagors were in fact minors at the date of the mortgage. There is no doubt a considerable mass of evidence tending to show minority, but when it is analysed there is nothing which appears to be really trustworthy, while there are certain facts which go to show that it is actually false. When a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him, or his representatives, when they set up the defence of minority. It is not enough that they leave the matter in doubt. They must satisfy the Court beyond reasonable doubt that the minority is a fact [See *Raja of Deo* v. *Abdullah* (1).]

The evidence for minority is as follows:—

Defendants' Ex. A-1 is an application put in by Kasim Ali Khan to be appointed guardian of the person and property of his four children. In the application the exact dates of brith of all four were given as follows:—

Nawab Mohammad Baqar Ali Khan, born 11th February 1891.

Nawab Ali Ahmad Khan, born 19th December 1892.

Nawab Askari Begam, born 28th March 1894.

Nawab Jafar Ali Khan, born 15th December 1895.

If these dates are correct then Baqar Ali Khan would not reach his majority till 11th February 1912, and, of course, he would be a minor on 13th April 1908, when the deed was executed. These dates rest primarily on the statement of the father Kasim Ali Khan, who put this application in, and the first argument against the correctness of the dates is the fact that Kasim Ali Khan was a tricky man, whose dealings with his property were tortuous. It is admitted that he made many mis-state-

(1) 45 Ind. Cas. 770; 45 C. 909 at p. 917; 35 M. L. J. 46; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 416; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 45 I. A. 97 (P. C.).

ments. Indeed, the history of the transactions relating to the property can only be explained on a theory of repeated frauds on the part of Kasim Ali Khan.

The property mortgaged consists of the shares of Baqar Ali Khan and Ali Ahmad Khan in the village of Jamwasi together with a house in Lucknow. This property was inherited by Kasim Ali Khan from his mother Amir Ali Mahal, who was one of the widows of the last King of Oudh. He transferred it to his wife by means of two deeds of gift, dated 9th February 1892, by which he conveyed the entire village of Jamwasi, and 10th August 1899, by which he conveyed the house property in Lucknow. The consideration for the first conveyance is set out as being three receipts for Rs. 10,000, Rs. 4,000 and Rs. 3,000. It is unlikely that this money was actually paid. A wife is not likely to begin by advancing these sums to her husband, without any sort of security, and then suddenly to obtain in exchange a much more valuable property. Probably Kasim Ali Khan's intention was to retain control of the property while he transferred the legal title to his wife, in order to defeat actual or possible creditors. This view is borne out, as we shall see, by a statement in the application for guardianship. On 21st June 1902 *Musammat* Rais-un-nisa executed a deed of gift of the village Jamwasi and of the house in suit to her four children, in proportion to the shares which they would have inherited under the Muhammadan Law. She exempted certain *sir* plots. The consideration was represented as being certain jewels presented by the children to their mother. This conveyance in also suspicious. We know that *Musammat* Rais-un-nisa had become liable to pay up a certain decree, and it is probable that the conveyance was made in order to defeat the decree-holder. The legal title having passed to the chidren, it became necessary for Kasim Ali Khan to obtain a certificate of guardianship in order to keep the control of the property in his own hands. It has been argued that he need not have done so, because as a father he would have been the natural guardian of the property of his children, but we find in the application itself the following paragraph (*k*) printed at page 8, part III:—

"That the father transferred the property to the minors subject to a prior charge, which he wishes to pay off by the sale of a portion of the said property, but since no one would purchase from the minors without the sanction of the Court, this application is made for the declaration of the guardian and sanction to sell a portion of the said property."

The statement that the father transferred the property is not true. It was the mother who made this transfer. The statement of the prior charge is probably not true either. We do not know of any such prior charge. The statement that the object of the application was to induce somebody to buy the property is probably true. But in face of the previous transactions it is impossible to attach much weight to the statements made by Kasim Ali Khan. If, as we are inclined to believe, Baqar Ali Khan was approaching his majority at the time this application was made, there were reasons which may have operated on the mind of Kasim Ali Khan, to understate the age of his children. The first was that, if he still regarded the property as his own, and intended to retain control of it, then the younger he made out his children, the longer his authority would last. The other is that if Baqar Ali Khan was represented in the application to be very nearly a major, it was quite probable that the learned District Judge would send for Baqar Ali Khan in order to hear whether he had any objection to the grant of a certificate which would have the effect of postponing his majority by three years. If Baqar Ali Khan was a child of twelve and the other three children were younger, this course would not be taken. This is our answer to the argument that Kasim Ali Khan could have had no motive for understating the age of his children at the time when he made the application.

The next document sheds some light on the methods pursued by this family in dealing with their property. It is printed in the Appendix. Parties are agreed to let it stand as part of the record. It will be remembered that when *Musammat* Rais-un-nisa gifted the village of Jamwasi to her children she exempted certain *sir* plots. She now proceeds to sell these plots for Rs. 2,000 to Dildar Ali. This Dildar Ali was her own *karinda* and he in his turn transferred these plots to Baqar Ali and Ali Ahmad for Rs. 4,000. This sale-deed bears the same date as the mortgage-deed in suit, and it was executed in order to furnish the mortgagors with a title to the

sir plots. Nevertheless, two years later on 9th April, 1910 *Musammat* Rais-un-nisa sells the same *sir* plots over again to her husband's brother Amjad Ali Khan. In the meantime certain things had happened. The *sir* lands had been attached in execution of a decree against Rais-un-nisa. Also the Court of Wards had taken over the estate of the minors. The Court of Wards set up the two conveyances by which the property passed from Rais-un-nisa first to Dildar Ali and then to the minors and the Subordinate Judge had dismissed the objections of the Court of Wards, holding that the position of the objector was not *bona fide*.

Similar to this is another transaction. It is plaintiff's Ex. No. 2, printed at page 68, part III. This is a mortgage of the house in suit executed by Rais-un-nisa in favour of one Bhagwan Das on 4th September 1907. She ignores her transfer of the year 1902 to her children, and asserts herself to be still the owner of the house. She proceeds to mortgage it for Rs. 1,000 and it is significant that the mortgage-money is partly realised by the payment of a debt due by her husband Kasim Ali Khan.

On 28th August 1908, Kasim Ali Khan resigned his guardianship on the ground that he intended to proceed to *karbala* on pilgrimage. His resignation was accepted on 7th November 1908, and, on 16th November 1908, his wife *Musammat* Rais-un-nisa applied for guardianship. A certificate was granted to her on 18th December 1908. We are unable to attach any independent weight to the dates of birth which were given in this application and certificate. It is in evidence that they were copied from the previous certificate, and it was natural that this should be done.

On 12th May 1909 a notification appeared in the Gazette that the Court of Wards proposed taking over the property of these minors. No doubt this action by the Court of Wards is evidence of the fact of minority, but it would be easy to attach too much weight to it. Enquiries on the subject of the children's age would naturally be addressed, in the first instance, to their parents. Kasim Ali Khan would produce the certificate of guardianship of the year 1903, and, unless the suspicions of the Court of Wards were in some way aroused, the father's statement backed by a certificate six years older, would probably be reckoned sufficient. It is not in evidence who moved the Court of Wards, or why they took the estate over. It appears that they released it in a few months. There are also entries in the revenue papers. The earliest of these sets forth that under an order, dated 7th December 1903, Baqar Ali Khan minor, under the guardianship of Kasim Ali Khan, becomes *lambardar* in place of *Musammat* Rais-un-nisa. This was natural after Rais-un-nisa's conveyance to her children and the appointment of Kasim Ali Khan as guardian. The *khewat* of the year when the document in suit was executed shows the mutation consequent on Dildar Ali's conveyance to Baqar Ali and Ali Ahmad. It shows them as minors under the guardianship of Kasim Ali Khan. This would have been of some importance if it had been in existence at the time the deed in suit was executed, for then it might be said that the mortgagees ought to have consulted the revenue papers, where they would have known on enquiry whether the mortgagors were majors or minors. But the order is dated 11th December 1908, some time after the deed in suit. It will be remembered that Dildar Ali's transfer was of the same date as the mortgage, and could not, therefore, have been the basis of an earlier mutation of names. This revenue paper may afford some slight evidence of minority, but it affords stronger evidence of the crooked ways of Kasim Ali Khan. The revenue papers also furnish no independent evidence of minority. All these entries could have been procured by the use of the original certificate of guardianship, or with the second certificate in favour of *Musammat* Rais-un-nisa.

From the shifting sand of the allegations and transactions of the parents, we turn with relief to a piece of solid evidence consisting of the endorsement made by the Sub-Registrar on the deed in suit at the time of registration. Both executants were present. The endorsement runs :—

"Nawab Ali Ahmad Khan stated his age to be 21 years. In my opinion he is more than 18 years old and was found major in every way."

Now according to the dates given in the application this young man was then 15 years and 4 months. It appears to us impossible that this should have been his real age. He himself asserted to the Sub-Registrar that he was 21. The Sub-Registrar doubted whether he was so much, and not knowing of the Judge's certificate, he ad-

dressed his mind to the question whether he was 18 or over, and on this point he felt no doubt, and he recorded that, in his opinion, he was more than 18 years old. That the Sub-Registrar should have formed such an opinion if the real age is 15 years and 4 months is impossible. On the strength of this evidence, therefore, we must reject the exact date given in the application for guardianship with regard to Ali Ahmad and once we have done this, the evidence on which the defendants rely falls to pieces like a house of cards, for if Ali Ahmad was in fact three or four years older than his father represented him to be, then Baqar Ali Khan is older still, and the age of the daughter Askari Begam, who is represented as two years younger than Ali Ahmad, comes to agree very well with her father-in-law's evidence.

Mohammad Jafar Husain Khan is a respectable witness. He is the father-in-law of Askari Begam, sister of the two mortgagors. He has given the date of his son's marriage both as November 1905 and November 1903. It is, however, common ground of the parties that the true date is 12th November 1903. If the dates in the certificate of guardianship are correct, Askari Begam was then nine and a half. This is an unusually early age for a Muhammadan girl of good position to marry, but the matter does not stop there. This witness says that Askari Begam contracted the marriage for herself, being of the age of discretion. The witness says that he was told at that time that she was 15. He did not himself see her until she came to his house after marriage, but then she appeared to him to be about 14 or 15 years of age, and about a year and a half after she gave birth to a child. Now this evidence appears to us particularly weighty, because it is evidence not merely of an opinion formed of the age, and perhaps dimly recollected after so many years; on the contrary it is evidence of a transaction which could not have taken place if the child had been only nine years old. No doubt there is authority for the proposition that Shia Law regards nine as the age of puberty, but there is no authority for saying that any one regards nine as the age of discretion, or that a girl of nine would ever be allowed to contract hereself in marriage. It has been suggested that the child might contract herself in marriage in order to get rid of the option of puberty. But this is not so. There is no option of puberty when a girl is contracted in marriage by her father any more than when she contracts herself. There is no reason why this form should be adopted if the child was really only nine. Moreover, this witness has no motive to mis-state the facts. His daughter-in-law still possesses some interest in the property, which she stands to lose if the plaintiff succeeds. The Court that heard the witness did not disbelieve him, but in face of other evidence, which appeared to it more weighty that it does to us, the Court attempted to reconcile his evidence with that of the defendants, by vague suggestions, which it is unnecessary to discuss here.

Against this oral evidence of the plaintiff, there are several defence witnesses, but the Court of Trial did not attach much weight to any of them, except to D. W. No. 3, Abbas Mirza, who is the father-in-law of Baqar Ali Khan. The marriage took place on 10th September 1907. This witness gives evidence that on that date Baqar Ali Khan was $16\frac{1}{2}$ years old. His own daughter he says was 18 years and one month old at that time. The witness was prepared to accept so much disparity of age, but he wished to see the boy in order to satisfy himself that the disparity was not greater. Accordingly he says he did see the boy, and that Kasim Ali Khan showed him the certificate of guardianship, which, however, the witness could not read, and he was satisfied. We should not have been disposed to attach great weight to the evidence of this witness because he is highly interested. He is acting on behalf of defendants Nos. 2, 3 and 4. But the Court of Trial has recorded its opinion, from observation of the witness in Court, that he is a truthful witness, and we are always disposed to attach great weight on such a point to the Court that heard the witness. But, it is to be noted that the Court considered that the witness's knowledge was based on a statement by Kasim Ali Khan. That is, the Court attributed no particular weight to the witness's own observation of the boy. A statement by Kasim Ali Khan appears to us to carry no weight at all. If he had given wrong ages in his application for guardianship, he might find it necessary to stick to the same statement in other transactions. Again, applying the same test to this witness which we applied to Mohammad Jafar Husain Khan, we find that though the allegation is

in favour of the defendants, the transaction is in favour of the plaintiff. The marriage did take place. Baqar Ali Khan was believed to be old enough for the bride. It did not concern anyone how much older than sixteen the boy might be. As the witness said in cross-examination that if Baqar Ali Khan had been 21 that would have been no objection to the marriage.

We are not impressed by the argument based upon the two deeds in which *Musammat* Rais-un-nisa described herself to be 28 in the year 1902, and 33 in the year 1907. It is not to be expected that a lady would be absolutely accurate in stating her age, whether in conversation or in a formal document. Very few ladies really know their own ages accurately and they have a natural desire to wish to be thought younger than they are. We cannot accept a recital by *Musammat* Rais-un-nisa in a deed as establishing the fact of her own age on so strong a foundation as to support an inference with regard to the minority of her children.

We have given our careful attention to all the evidence, which weighed with the Court of Trial, but we are not satisfied that the two executants were minors at the time of execution. On the contrary we think it is quite probable that they were majors. This finding of fact is sufficient to dispose of the appeal and it becomes unnecessary to consider the questions of law, which would arise if we were to find in fact that the executants were minors.

We allow the appeal. The case must go back to the Court of Trial for decision of the remaining issues. These relate to the defences set up by defendants Nos. 5, 6 and 7. The appellant will get costs of the appeal, but which of the defendants are to pay these costs will be decided by the learned Subordinate Judge when he decides the remaining issues.

As regards the cross-objections of respondent No. 7 the issues that concern this respondent have not been decided. We, therefore, return the case without passing any order on these cross-objections. If he is dissatisfied with the new decree which the Subordinate Judge will pass he can appeal against it.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1548 OF 1922.
February 18, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

BROJO NATH DAS CHAUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUR RAHAMAN MIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 49—Notice to quit—Unambiguous notice.

Under s. 49, Bengal Tenancy Act, the notice to quit a tenancy must be a reasonable notice having regard to the nature of the tenancy and the date of the expiry of the agricultural year as prescribed therein. The notice must be read as a whole. [p. 114, cols. 1 & 2.]

The agricultural year of a tenancy ended with the month of *Chaitra*. A notice to quit called upon the tenant to vacate within 30th *Chaitra* and to sever all connection with the land from the 1st *Baisakh*. The month of *Chaitra*, however, had 31 days in that year:

Held, that the notice to quit, read as a whole, was a clear and unambiguous notice, notwithstanding the error as to the last date of the agricultural year. [p. 114, col. 1.]

Appeal against the decree of the Subordinate Judge, Second Court, Sylhet, dated the 30th of March 1922, affirming that of the Munsif, Fourth Court at Habiganj, dated the 22nd of July 1921.

Babu *Gopal Chandra Das*, for the Appellants.

Babu *Birendra Kumar Dey*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs against a decision of the Second Subordinate Judge of Sylhet dated the 30th of March 1922 confirming a decision of the Munsif. The plaintiffs sued to eject the defendants from their homestead and certain agricultural land. The defendants had no occupany rights but held under a lease for one year commencing in 1314. After the expiration of one year the defendants held over under the terms of the tenancy until the year 1322. In the year 1322 the notice dated 14th *Aswin* 1322 was prepared by the plaintiffs and served on the defendants on the 17th of October. The defence taken by the defendants was that they were occupancy *raiyats*, that no notice was served and that if it was served it was invalid. Both the Courts have found that the defendants had no occupancy rights and that the notice was served but the First Court held that the notice was insufficient and also that the *nazarana* of Rs. 160 which had been paid by the defendants to the

plaintiffs must be returned as a condition of ejecting them. The Second Court held that no refund of *nazarana* was necessary but held that the notice was not sufficient, agreeing with the Munsif on this point. Hence this appeal. The notice is addressed to the tenants. It states the land and the boundaries of the land occupied by them and that the defendants had been cultivating the land under the plaintiffs, that the defendants had no occupancy rights and were tenants-at-will liable to be ejected and that they had no right to cultivate the land against the plaintiffs' will. The notice further states that as the defendants had been mischievous and hostile to the plaintiffs it was necessary to bring the land into plaintiffs' *khas* possession and that the defendants were so informed by the notice within 30th *Chait* next to appear before their landlords or their agents and duly submit *istafa*, failing which proceedings would be taken against them and the defendants would have no connection with the above land from 1st *Baisak* 1323 *B. S.* Whether six months' notice is necessary or merely a reasonable notice is necessary, in my opinion, the notice in question complies with all these requisites. The Courts below apparently were influenced by the fact that the notice refers to the 30th *Chait* and that in the year 1322 *Chait* had 31 days and that, therefore, the notice did not expire with the year of the tenancy. But we think that both the Courts below failed to take into account the effect of the concluding words of the notice, namely, that the defendants had no connection with the land from the 1st *Baisak* 1923. We think that you must read the notice as a whole and if you do so it was a clear or unequivocal notice to quit and expiring on the 31st *Chait*, that is to say, the end of the agricultural year. This, in my opinion, fulfils either the requirement of being a reasonable notice or being a six months' notice expiring with the year of the tenancy itself. I feel some doubt, however, whether the six months' rule of English Law is applicable in this country. As has been pointed out in *Harifulla Gain* v. *Benode Behary Mondol* (1) there is no necessity to import into the agricultural law of this country the six months' notice required in the case of an annual tenancy in England or as required here in the Presidency Towns and although it is not necessary for the reasons which I have indicated to decide the point in this case, my own view is as that what is needed is a reasonable notice having regard to the nature of the tenancy and the date of the expiry of the agricultural year as indicated in the provisions of s. 49 of the Bengal Tenancy Act.

The appeal accordingly succeeds and the plaintiffs will be entitled to the decree for ejectment which they sought in the suit and to their costs in all Courts.

Mukerji, J.—I agree.

N. H. *Appeal allowed.*

(1) 19 Ind. Cas. 557; 17 C. W. N. 932.

ALLAHABAD HIGH COURT.

FIRST APPEALS FROM ORDER NOS. 25 AND 26 OF 1925.

May 8, 1925.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

ISWAR DATT UPADHIYA—DEFENDANT—APPELLANT

versus

MAHESH DATT UPADHIYA AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 12—U. P. Land Revenue Act (III of 1901), s. 131—Sale in favour of co-sharer in patti*—Partition of* patti *before sale, taking effect after sale, effect of—Vendee becoming co-sharer in* patti *by virtue of previous sale—Right of pre-emption—Priority, determination of.*

Patti J in a village was partitioned and was divided into several *pattis*, one of the new *pattis* being called *patti* B. The partition was confirmed by the Collector on 15th December 1922. On 27th April 1923 *B* sold certain property in *patti* B to *I* and on 10th August 1923 *G* also sold a certain property situated in *patti* B to *I*. *M* who was a co-sharer with *B* and *G* in *patti* B brought a suit to pre-empt the sales. *I* was a co-sharer with *B* and *G* in *patti J* before the partition but was not a co-sharer with them in *patti B*. *I* was a nearer heir of *B* and *G* than *M* :

Held, (1) that the partition which was confirmed on the 15th December 1922 did not by virtue of the provisions of s. 131 of the U. P. Land Revenue Act take effect till the 1st July 1923 ; [p. 115, cols. 1 & 2.]

(2) that consequently on 27th April 1923 when the first sale was made by *B* in favour of *I*, *M* the pre-emptor had no better right to take the property sold than *I* had inasmuch as at that time both parties were co-sharers in *patti J* ; [p. 115, col. 2.]

(3) that by virtue of the first sale *I* became a co-sharer in the new *patti* B on the date when the partition took effect and that consequently by the date of the second sale, that is the 10th August 1923, he had acquired an equal right of pre-emption with *M* ; [*ibid.*]

(4) that both the sales having taken place subsequent to 17th February 1923, the date on which the

Agra Pre-emption Act came into force, the cases were governed by the provisions of that Act ; [*ibid.*]

(5) that both the pre-emptor and the vendee being in the same class of pre-emptors, *I* who was a nearer heir of both the vendees than *M* had a preferential right to retain the property under sub-s. (3) of s. 12 of the Agra Pre-emption Act. [*ibid.*]

First appeals from an order of the Subordinate Judge, Basti, dated the 8th November 1924.

Mr. *Harnandan Prasad*, for the Appellant.

JUDGMENT.—The following pedigree will explain the position of the parties :—

JAGANNATH

Ishwar Dat.	Shyama Nand	Sada Nand	Rama Nand
	Mahesh Dat.	Brij Mohan	Ganesh Dat.

The principal defendant in the two suits out of which these appeals have arisen is Ishwar Dat, whose name appears in the pedigree above. Two sale-deeds were executed in his favour, one on the 27th April 1923 by Brijmohan and the second on the 10th of August 1923 by Ganesh Dat.

It appears that previous to certain partition proceedings, which are about to be mentioned, all these parties were co-sharers in a *patti* of *Mouza* Latwapur called *patti* Jagannath.

A partition was begun and by the 15th December 1922 the partition was confirmed by the Collector. Under s. 131 of the Land Revenue Act that partition could not take effect till the 1st July 1923.

Under the arrangement which was made by these partition proceedings, *Patti* Jagannath was divided, and one of the new *pattis* erected was *patti baqimanda*. In this *patti baqimanda*, the pre-emptor in both suits, namely, Mahesh Dat Upadhiya, is a co-sharer with each of the vendors. It is admitted that Ishwar Dat, the purchaser, is not a co-sharer in *patti baqimanda* from the date on which the partition takes effect.

The Court of first instance dismissed both these suits for pre-emption, being of opinion that the partition could not take effect in law up till the 1st of July 1923, regard being had to the provisions of s. 131 of the Land Revenue Act. The Munsif held that although the partition proceedings had been brought to an end by the Collector's order of confirmation passed on the 15th of December, 1922, yet for the purposes of pre-emption, the previous relations between the parties were still in existence and did not determine until the partition became effective.

We have no doubt whatever that the view taken by the Munsif is correct and we disagree with the judgment of the Court below in the contrary sense.

We have then to consider what was the situation on the 27th of April 1923 when the first of these two sales was made by Brijmohan in favour of Ishwar Dat. Having regard to the state of things which existed before the partition became effective, the plaintiff-pre-emptor had no better right to take this property than the vendee had, because at that time both parties were co-sharers in the *Patti* Jagannath.

Then, as rightly held by the First Court, if we come to the conclusion that the suit of the plaintiff must fail with regard to the first of these two sales, it must necessarily fail with regard to the second, because by virtue of the first sale the vendee Ishwar Dat, by the time of the second sale, *i.e.*, the 10th August, 1923, had become a co-sharer in the new *patti-patti baqimanda.*

As regards both the sales then the position is this that both the pre-emptor and the vendee Ishwar Dat are in the same category of pre-emptors. None of the Courts below seems to have appreciated the fact that both these cases are governed by the Agra Pre-emption Act (XI of 1922), both the sales having taken place subsequent to the commencement of the Act, the date of which was the 17th February, 1923.

Both the pre-emptor and the vendee being in the same class of pre-emptors under the scheme provided by s. 12, in order to ascertain whether there is any preference between them we have to refer to the provisions of sub-s. (3) of s. 12. There a preference is given to the person who is the nearest heir of the vendor. If we look at the pedigree, which is set out at the head of this judgment, the rights of the cases are with the vendee, Ishwar Dat, for he is a nearer heir of both the vendors than is Mahesh Dat the pre-emptor.

We hold, therefore, that in neither case is the plaintiff entitled to pre-empt and we, therefore, allow both these appeals, set aside the decrees of the Courts below, and direct that the plaintiffs' claim be dismissed in all Courts with costs, including in this Court fees on the higher scale.

Z. K. *Appeals allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2235 OF 1922.

March 20, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

GOBINDA CHANDRA BASAK—DEFENDANT No. 2—APPELLANT

versus

PARSA NATH NAG BISWAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 74—Mortgage—Payment of mortgage-money by stranger, effect of—Subrogation.

A stranger paying off a mortgage-debt, even if not asked to do so by the mortgagor, is entitled to be subrogated to the rights of the mortgagee to the extent of the payment made by him, notwithstanding the provisions of s. 74 of the Transfer of Property Act. [p. 117, col. 1.]

Chetwynd v. *Allen*, (1899) 1 Ch. 353; 68 L. J. Ch. 160; 47 W. R. 209; 80 L. T. 110 and *Butler* v. *Rice*, (1910) 2 Ch. 277; 79 L. J. Ch. 652; 103 L. T. 94, relied on.

Appeal against a decree of the Second Additional District Judge, Dacca, dated the 6th of June 1922, reversing that of the Subordinate Judge, Fifth Court, of that District, dated the 18th of January 1921.

Messrs. *Basak* and *B. Krishna Kishore Basak*, for the Appellant.

Messrs. *Mahendra Nath Roy*, *Troilakho Nath Ghose* and *Jatindra Mohon Ghose*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the second defendant against a decision of the Additional District Judge of the Second Court of Dacca reversing the decision of the Subordinate Judge of the Fifth Court of the same place. The suit out of which the appeal arises was brought by the plaintiffs to recover money due on mortgage executed by defendant No. 1 in favour of the plaintiffs on the 31st January 1914. Two properties belonging to defendant No. 1 were comprised in the mortgage but we are only concerned for the purposes of this appeal with property No. 1 because no question arises with regard to the charge in respect of property No. 2. On the 25th of January 1912 the first defendant mortgaged property No. 1 to defendant No. 3 to secure an advance of Rs. 1,000. Subsequent to this sometime in the year 1912 a money-decree was obtained against defendant No. 1 and in execution of the decree the right of defendant No. 1 was put up for sale. This right of course at this time was an equity of redemption in the property subject to the mortgage created in favour of defendant No. 3. At the execution-sale the equity of redemption in property No. 1 was bought by defendant No. 2 on the 10th May 1913 for a sum of Rs. 30. We are told that the value of the property free from mortgage amounted to Rs. 4,000 or Rs. 5,000. Anyhow Rs. 30 was an inadequate price if the property was free from encumbrance. The sale was confirmed on the 11th June 1913 and from this time forward defendant No. 1 had no interest in the property No. 1. Nevertheless on the 31st January 1914, he purported to mortgage both properties Nos. 1 and 2 to the plaintiffs to secure a sum of Rs. 2,000. Rupees 760 were paid at the time of the execution of the mortgage to defendant No. 1 and the balance of Rs. 1,240 was left in the hands of the plaintiffs. Subsequently this money was withdrawn and as the lower Appellate Court has found was taken to defendant No. 3 by defendant No. 1 accompanied by an officer of the plaintiffs and the money was applied in reduciug the sum due on the original mortgage in favour of defendant No. 3. The whole of the charge was paid off with the exception of sum of Rs. 60 and on the 12th March 1917 in consideration of a sum of Rs. 87 paid by the plaintiffs to defendant No. 3 a *kabala* was executed by defendant No. 3 in favour of the plaintiffs. Thereby defendant No. 3 purported to sell to the plaintiffs his interest in the original mortgage-bond of the 25th January 1912 for a consideration of Rs. 87. Under these circumstances the suit was brought by the plaintiffs to recover the money which they had paid to defendant No. 1 and which had been applied *pro tanto* in the reduction of the mortgage-debt to defendant No. 3.

Now the argument urged before us is that as on the 31st January 1914 the defendant No. 1 had no interest in property No. 1, the provisions of s. 74 of the Transfer of Property Act have no application and that accordingly the plaintiffs being strangers are not entitled to be subrogated to the rights of defendant No. 3 by virtue of his mortgage in respect of his property otherwise than in respect of the sum of Rs. 87 which had been paid by the plaintiffs on the 12th March 1917 and in respect of which the *kobala* of that date had been executed and that is the real point which arises for our decision in this appeal, namely, whether a stranger, notwithstanding the provisions of s. 74 of the Transfer of Property Act

under the circumstances which I have indicated is entitled to be subrogated to the rights of defendant No. 3 in respect of the mortgage-debt which was paid off by the money of the plaintiffs ond secondly assuming that this is so, whether or not there was anything in the *kobala* of the 12th March, 1917 which prevents this principle being carried into effect. Nobody disputes that if a person at the instance of somebody interested in the property, the mortgagor or some other person, discharges the mortgage-debt the person who pays the money is entitled to stand in the shoes of the mortgagor to the extent of his mortgage for the amount of the debt that has been paid. It seems to me that the doctrine has been further extended so that a stranger who pays off the mortgage-debt even if not asked to do so by the mortgagor is entitled to the same rights, that is to say, in both the cases, which I have mentioned, the Court assumes that even though there has been no assignment of the debt it was the intention of the parties that the debt should be kept alive for the benefit of the person who has provided the money out of which the debt or a portion thereof was paid off. I have not been able to discover that there is any actual authority to this effect in any of the decisions which have been given either in this country or by the Judicial Committee. But there is no doubt that the two decisions to which I shall presently refer, by the Chancery Division in England have extended the doctrine of subrogation to a stranger under certain circumstances. The first of those decisions is in the case of *Chetwynd* v. *Allen* (1). In that case Chetwynd who was a trustee for his wife of certain property and his wife joined in mortgaging this property to a man named Tyrell. Subsequently the husband, Mr. Chetwynd, approached a man named Mynors and asked him to make an advance to discharge Tyrell's debt. Mynors accordingly advanced the money and this money was applied in part discharge of Tyrell's debt and Chetwynd, the husband, without the consent of his wife purported to create a charge in Mynors' favour in respect of the sum which Mynors had advanced Clearly, he had no authority to do so and there was no valid mortgage in favour of Mynors and Mynors had no interest in the property and was merely a stranger although he had advanced money to be applied in the liquidation of the mortgagee debt. But even so, Mr. Justice Romer, as he then was, decided that Mynors was entitled to stand in the shoes of the original mortgagee Tyrell for the amount he had advanced. This clearly laid down the principle that the doctrine of subrogation can be extended even in respect of a stranger who had no interest in the mortgage property. That case was followed by Mr. Justice Warrington in the case of *Butler* v. *Rice* (2). In that case Mr. Rice was the owner of a certain property which was charged in favour of a Bank to secure a sum of £450. The husband of Mrs. Rice got Mr. Butler to advance a sum of money out of which the charge to the Bank was paid off. But Mrs. Rice refused subsequently to execute a mortgage in favour of Butler and accordingly he sued. Butler, on these facts was a stranger and was not interested in the mortgage-property or in the equity of redemption. But notwithstanding that, Mr. Justice Warrington found that he was entitled to stand in the shoes of the Bank for the amount which he had advanced to pay off the charge to the Bank. This again is an authority for the proposition which I have indicated with regard to the rights of a stranger who has paid money which has been applied in the liquidation of the mortgage-debt. Consequently, it seems to me that if you apply the principle of these cases to the facts of the case before us the plaintiffs are entitled to stand in the shoes of defendant No. 3 for the amount of their advance in so far as that amount has been paid in reducing the amount due on the mortgage. The only difficulty is whether one can infer from the *kobala* of the 12th March 1917 that any intention was negatived thereby to keep alive the mortgage in favour of the man whose money had been applied in reducing the mortgage-debt. Now the document is a very inartistic document. It first of all refers to the fact that defendant No. 3 the mortgagee had received from certain realisations some sums on account of the mortgage. It does not refer to the fact that this sum had been provided by money of the plaintiffs and in consideration of a sum of Rs. 87-10, he purports to convey the interest of defendant No. 3 to the plaintiffs in the mortgage bond. We think that there is no doubt that if the document is read

(1) (1899) 1 Ch. 353; 68 L. J. Ch. 160: 47 W. R. 200; 80 L. T. 110.

(2) (1910) 2 Ch. 277; 79 L. J. Ch. 652; 103 L. T. 94.

literally it was a conveyance of the interest at the date of the conveyance of defendant No. 3 in the mortgage-bond the only interest at that time, having regard to the previous payment, was to receive a sum of Rs. 87. But we think that you must take the transaction as a whole and I do not think that this document, if it bears the narrower interpretation which I indicated, necessarily negatives the idea that it was the intention of the parties that the mortgage should be kept alive for the benefit of the plaintiffs who had provided the money.

Consequently, we think that the decision of the District Judge was right and that the plaintiffs are entitled to the relief which he has given and this appeal accordingly fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 82 OF 1922.

July 13, 1923.

Present:—Justice Sir P. C. Banerji, KT., Acting Chief Justice, and Mr. Justice Ryves.

SIDHARI RAM—PLAINTIFF—APPELLANT

versus

DR. GARGI DIN—DEFENDANT—RESPONDENT.

Mortgage—Sale of mortgagee rights—Suit for redemption—Vendee, whether can resist suit—Acknowledgment of subsisting mortgage—Limitation Act (IX of 1908), s. 19.

In a suit for redemption of a grove it appeared that the original mortgagee had sold his mortgagee rights to the defendant. The sale-deed expressly recited that the mortgagee had been in possession for a long time and that it was the mortgagee rights which were being transferred :

Held, (1) that the very fact of the mortgagee selling his rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fact of the defendant purchasing those rights was an acceptance on his behalf of an existing mortgage, a mortgage which was in force as a subsisting mortgage at the date of the sale to him ; [p. 119, col. 1.]

(2) that, therefore, the defendant had no ground for resisting the redemption suit. [*ibid.*]

Letters Patent Appeal against the judgment of Mr. Justice Gokal Prasad.

Messrs. *S. P. Sinha* and *U. S. Bajpai*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage. The mortgage is said to have been made by one Sahai in favour of Gaya Prasad and in the plaint it was stated that the mortgage had been made some time in 1870. Sahai's son was Kunji and the plaintiff claims to be the heir of Kunji. On the 28th of March 1908, Gaya Prasad, his brother and his son executed a sale-deed in favour of the defendant, Dr. Gargidin, of mortgagee rights in the grove now in dispute. In that sale-deed they stated that they were mortgagees of the grove of Kunji who was, as we have said above, the son of Sahai and they purported to sell their rights as mortgagees to the defendant Gargidin for Rs. 125. They stated in the sale-deed that they were in possession as mortgagees for a long time and that it was the mortgage under which they were in possession which they were transferring to Gargidin. The plaintiff in his plaint no doubt gave some particular of the mortgage, but in the fourth paragraph of his plaint he stated that the mortgage which he was seeking to redeem was the mortgage which the defendant Gargidin had purchased from Gaya Prasad in 1908, so that there can be no doubt that the mortgage which the plaintiff sought to redeem was the particular mortgage the rights in which were sold to the defendant Gargidin by Gaya Prasad, his brother and his son. Gargidin denied the mortgage set up by the plaintiff and denied every one of the allegations of the plaintiff. He even denied that the plaintiff was the representative of Sahai, but it appears that he helped the plaintiff in getting his name entered in the revenve papers as the legal representative of Kunji, the son of Sahai. The Court of first instance decreed the claim but that decree was set aside by the lower Appellate Court by a judgment which we cannot but regard as perverse. The learned Subordinate Judge who decided the case in the Appellate Court did not give due effect to the allegations in the plaint. He was under the impression that the plaintiff sought to redeem a particular mortgage and that it was not the very mortgage which the defendant had purchased and he proceeded to find whether the particular mortgage which the plaintiff set up was establish-

ed. He, in our opinion, misconceived the nature of the plaint. The plaintiff by this suit sought to redeem the mortgage which the defendant Gargidin had acquired by virtue of the sale-deed executed in his favour on the 28th March 1908, and for which he paid Rs. 125. That mortgage was set forth in the sale-deed and that mortgage was accepted by the defendant. Therefore, if the claim was not time-barred it was a claim which the defendant Gargidin had no ground for resisting. The very fact of Gaya Prasad selling his mortgagee rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fact of Gargidin purchasing those rights was an acceptance on his behalf of an existing mortgage, a mortgage which was in force, as a subsisting mortgage on the date of the sale to him. He was not purchasing such property which was on the date of sale not in existence. Therefore, the very fact of the execution of the sale-deed by Gaya Prasad and the acceptance of a sale from him by Gargidin was an admission of a subsisting mortgage of the property now in dispute. This being the mortgage which the plaintiff sought to redeem the suit which was instituted by the plaintiff was clearly within time comput ing limitation from the date on which the subsisting mortgage was acknowledged by the original mortgagee and by the purchaser from that mortgagee and was in substance accepted by the purchaser from that mortgagee. In this view the decision of the lower Appellate Court cannot be regarded as a decision that the mortgage sought to be redeemed had not been proved or did not exist. We think that we cannot regard the decision of the lower Appellate Court as a decision upon a question of fact and in view of the circumstances to which we have referred, the judgment of the learned Judge was clearly erroneous. We are unable to agree with the view of the learned Judge of this Court that the finding of the lower Appellate Court was finding of fact which was binding on him. In our opinion the suit was rightly decreed by the Court of first instance.

We allow the appeal set aside the decree of this Court and of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

K. S. D. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 71 OF 1924.

February 26, 1925.

Present :—Mr. Baker, J. C.

MOHAMMAD ABDUL SATTAR—PLAINTIFF—APPELLANT

versus

KONDIBA AND OTHERS—DEFENDANTS—RESPONDENTS.

Costs—Mortgage suit—Execution admitted—Interest disputed—Pleader's fees, calculation of—Contract Act (IX of 1872), s. 74—Interest, enhanced rate of, from date of bond in case of default—Penalty—Waiver.

For the purpose of calculation of Pleader's fees as costs in a mortgage suit, the mere fact that the amount of interest claimed is alone disputed by the defendant does not make the suit undefended so as to disentitle the plaintiff from being awarded full Pleader's fees, if the point is found in his favour and against the defendant. [p. 120, col. 1.]

A retrospective stipulation for the payment of increased interest, under which the increased interest is to run from the date of the bond and not merely from the date of default is penal. Where, however, the creditor waives the penal stipulation and claims increased interest only from the date of default, there is no reason why such increased interest should not be allowed. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Class, Bhandara, dated the 30th June 1924, in Civil Suit No. 4 of 1924.

Mr. *D. W. Kathale*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—The only points raised in this appeal are as to the Pleader's fee and the rate of interest awarded by the lower Court.

The suit was for sale based on two mortgage-bonds against defendants Nos. 1 and 2, the mortgagors and defendant No. 3, a subsequent purchaser of part of the mortgaged property, Defendants Nos. 1 and 2 were absent and the suit was *ex parte* against them Defendant No. 3 admitted the execution, attestation and consideration of the mortgage deeds, but objected to the rate of interest and to interest being claimed from date of suit to date of decree.

I am of opinion that the Court had to frame issues and hear arguments on this point, the suit cannot be considered to have been undefended within the meaning of Civil Circular No. II 4, VI. The fact that the sum disputed only represent about Rs. 120 out of Rs. 6,411 makes no difference. The full Pleader's fee must, therefore, be calculated.

As regards interest, the interest in the bonds is 8 annas (6 per cent.) and in case

of default 1 rupee (12 per cent.) from date of execution of the bonds, but the plaintiff claims only interest from the date of default. It is contended that this is reasonable and should have been allowed. The lower Court held the stipulation penal.

The respondents rely on the cases of *Anand Rao Vinayak* v. *Balkrishna Madhav* (1) and *Jagannath Prashad* v. *Balichand* (2) in which it was held that an agreement to pay a higher rate of interest with retrospective effect is penal and cannot be enforced.

Where the stipulation is retrospective and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered as a penalty.

It is, therefore, clear that if the increased interest had been claimed from the date of the bond it could not be enforced.

The plaintiff, however, has waived this penal stipulation and has claimed only increased interest from the date of default and there appears to be no reason for not awarding this.

The decree of the lower Court will be varied by awarding the plaintiff interest at 12 per cent. from the date of the default, and the full Pleader's fee will be allowed. The time fixed for payment has expired, but in accordance with the practice of this Court six months' time will be granted from the date of this decree for payment.

Costs of this appeal will be borne by respondents.

G. R. D.

Z. K. *Decree varied.*

(1) 8 C. P. L. R. 77.
(2) 4 N. L. R. 187.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 776 OF 1925.

June 15, 1925.

Present:—Mr. Justice Sulaiman.

RAM RATAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DURGA KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Hindu Law—Joint family—Suit by manager—Decree, whether binding on members.*

A manager of a joint Hindu family represents the family and, therefore, all its members, as against a third party. When he institutes a suit as manager in the interest of the family against a stranger all the members must be deemed to be represented in it through him. The result of the suit binds not only the manager but all the members of the family unless, of course, any fraud or collusion were established which would vitiate the decree. The mere ground that in the opinion of the minor sons their fathers did not look after the case sufficiently well, or that they were careless or negligent in the conduct of their case, would not be a good ground for ignoring the effect of the decree. The question of carelessness or negligence may arise in cases where a suit is instituted by a guardian on behalf of his ward and the question of a case being properly and fairly fought out may also arise when a limited owner like a Hindu widow is representing the estate for the time being. But these considerations cannot arise when the manager of a family, not as a mere reversioner, but as proprietor in whom the interest actually vests, institutes a suit and instead of impleading all the members of the family sues on their behalf as manager. [p. 120, col. 2; p. 121, col. 1.]

A decree obtained under such circumstances is binding not only on all the members of the family who are then alive but also on those who are born subsequently. [p. 121, col. 1.]

Second appeal against a decree of the Additional District Judge, Gorakhpur, dated the 21st of January 1925.

Mr. *Shiva Prasad Sinha*, for the Appellants.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for a declaration that the minor plaintiffs along with defendant No. 7 are occupancy tenants of the plots in dispute. The Courts below have dismissed the suit on the ground of *res judicata*. It appears that previous to the suit the fathers of the three plaintiffs instituted a suit in respect of the same property asking for the same declaration. That case was decided against them and their appeal was dismissed by the Appellate Court. The plaintiffs who are minors admit the existence of the previous judgment but in the plaint they stated that their fathers did not look after the previous case properly and on this ground they sought to evade its binding nature. There was no suggestion of any fraud or collusion in the plaint nor was there any issue framed on that point.

The lower Appellate Court has distinctly found that the previous suit was instituted by the former plaintiffs as *managers of their respective families*. That finding is fatal to this appeal. In my opinion a manager of a joint Hindu family represents the family and, therefore, all its members, as against a third party. When he institutes a suit as manager in the interest of the family against a stranger all the members must be deemed to be represented in it through him.

The result of the suit binds not only the manager but all the members of the family unless of course any fraud or collusion were established which would vitiate the decree. The mere ground that in the opinion of the minor sons their fathers did not look after the case sufficiently well, or that they were careless or negligent in the conduct of their case, would not be a good ground for ignoring the effect of the decree. The question of carelessness or negligence may arise in cases where a suit is instituted by a guardian on behalf of his ward and the question of a case being properly and fairly fought out may also arise when a limited owner like a Hindu widow is representing the estate for the time being. But these considerations cannot arise when the manager of a family, not as a mere reversioner, but as proprietor in whom the interest actually vests, institutes a suit and instead of impleading all the members of the family sues on their behalf as manager. In my opinion a decree obtained under such circumstances is binding not only on all the members of the family who are then alive but also on those who are born subsequently. If this were not the law then the result would be that there would be no end to litigation. Every member of a Hindu family would be empowered to institute a fresh suit on the allegation that the previous suit was not properly conducted by the then manager of the family, such a position would, in my opinion be intolerable.

That a manager of a joint Hindu family can sue on behalf of all members is well-settled, *vide* the Full Bench case of *Madan Lal* v. *Kishen Singh* (1). The case of *Bhup Kuar* v. *Balbir Sahai* (2) is distinguishable because at the time when the brother had instituted the suit the younger brother was not born, and further in the presence of the father the elder brother could not be said to be the manager of the family. It is argued that by implication it was held in this last case that the suit by one co-parcener for setting aside an alienation is not a representative suit on behalf of the other co-parceners. It is unnecessary for me to express any opinion on this point because in a suit brought to contest an alienation by a manager different consideration may arise inasmuch as the manager who alone can represent the family is disqualified by his own act from challenging it. If, however, a suit be treated as a representative suit then the principle underlying the decision of the Full Bench in *Kesho Prasad Singh* v. *Sheopargash Ojha* (3) will apply.

In my opinion, therefore, the decree in the former litigation binds the plaintiffs completely.

The appeal is accordingly dismissed under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

(1) 15 Ind. Cas. 138; 9 A. L. J. 844; 34 A. 572.
(2) 64 Ind. Cas. 885; 19 A. L. J. 978; 44 A. 190; (1922) A. I. R. (A.) 342.
(3) 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A.) 301.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1575 OF 1922.

April 28, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Panton.

ABDUL RAHAMAN MIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati SALIMANNESSA BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XXXIV, r. 1—Mortgage suit—Necessary parties—Co-mortgagee, whether must be joined—Non-joinder affecting decision on merits—Appeal—Decree, whether must be reversed.

The heirs of a deceased co-mortgagee must be joined as parties to a mortgage suit. [p. 122, col. 1.]

Where the merits of a case have been affected by the non-joinder of a necessary party, the provisions of s. 99 of the C. P. C., can have no application. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Second Court, Tippera, dated the 31st of March 1922, modifying that of the Officiating Munsif, Second Court at Comilla, dated the 9th of February 1921.

Babu *Prokash Chandra Pakrashi*, for the Appellants.

Mr. *Nurul Huq Choudhury*, for the Respondents.

JUDGMENT.

Panton, J.—This is an appeal against a decision of the Subordinate Judge of Tippera, modifying a decision of the Munsif, Seventh Court, Comilla. The suit was one for enforcement of a mortgage-bond executed in favour of two persons, Aftabuddin and Abdul Wahed. Aftabuddin is

dead ; he left two heirs. One of these is the first plaintiff. The other was Aftab-uddin's sister Majidunnessa. The second plaintiff is Abdul Wahed. The learned Munsif was of opinion that the failure to join Majidunnessa's heirs as parties to the suit was in violation of O. XXXIV, r. 1, of the C. P. C. and for that reason the suit must fail ; he accordingly dismissed the suit. The learned Subordinate Judge, on the other hand, relying upon certain decisions of this Court, which he has cited in his judgment, has held that "the suit is maintainable for plaintiff No. 1's half the share of Altafuddin's half share." He adds "the plaintiff will recover three-fourths of the money due on the mortgage deducting Rs. 125 paid. Defendants are allowed three months' time to pay, in default the mortgaged property will be sold and proceeds paid in satisfaction of the decree. By "plaintiff" I suppose that the learned Subordinate Judge has intended "plaintiff Nos. 1 and 2." In making this order it is evident that the Subordinate Judge ignored the possible mortgage lien of the heirs of Majidunessa. It seems to me that in the circumstances of the present case the decisions which relate to suits against joint mortgagors have no direct bearing. The cases of *Shivubai Rajaram Shete* v. *Shiddheswar Martend Hegde* (1) and *Sabduralli* v. *Sadashiv Supde* (2) which have been cited by the learned Vakil for the respondents are similarly of little assistance in the present case The learned Vakil has suggested that s. 99 of the C. P. C. may be invoked. But when, as I have just now pointed out, the merits of the case have been affected by the non-joinder, this provision of the law can have no application.

The learned Vakil for the respondents has further sought to support the decision of the learned Subordinate Judge on the ground that after all, any suit by Majidunnessa's heirs is barred by limitation. I am not prepared to say in the absence of Majidunnessa's heirs whether their claim is barred by limitation or not. We have been asked to remand the case to the lower Appellate Court in order that this lady's heirs may be impleaded. But having regard to the fact that the respondent wilfully refused to make them parties at an earlier stage of the litigation, we do not think that this is a case in which the course suggested should be adopted.

For these reasons, we think, that the decree of the learned Subordinate Judge should be set aside. We accordingly set aside the judgment and decree of the learned Subordinate Judge and restore the judgment and decree of the learned Munsif with costs to the appellants in all the Courts.

Cuming, J.—I agree.

Z. K. *Appeal allowed.*

(1) 61 Ind. Cas. 590; 45 B. 1009; 23 Bom. L. R. 405.
(2) 51 Ind. Cas. 223; 43 B. 575; 21 Bom. L. R. 369.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1097 OF 1924.

April 20, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

CHUNNI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

FIRM SHEO CHARAN LAL LALMAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 5, 7 (iv) (f)—Court-fees—Reference to Taxing Judge—Court, whether can consider question of Court-fees—Suit for accounts—Appeal by defendant—Valuation of appeal—Interpretation of Statutes—Fiscal enactment—Headings, whether can be considered—Partnership—Dissolution—Neglect of business by partner—Retirement of partner.

In a case where there has been a reference to the Taxing Officer or the Taxing Judge the question of insufficiency of Court-fees paid on a memorandum of appeal cannot be raised again at the time of the hearing of the appeal, inasmuch as s. 5 of the Court Fees Act is a bar to any such re-consideration. But where no reference under s. 5 has been made at all the Court hearing the appeal must decide the question. [p. 123, col. 2.]

Jugal Pershad Singh v. *Parbhu Narain Jha*, 8 Ind. Cas. 1145; 37 C. 914 and *Dhupati Srinivasacharlu* v. *Perindevamma*, 33 Ind. Cas. 602; 39 M. 725; 30 M. L. J. 402, relied on.

In cases where the valuation of a suit or an appeal has of necessity to be arbitrary and tentative the person who has to present a petition of plaint or appeal and who is called upon to pay the necessary Court-fees will have to fix the valuation and unless the Court is of opinion that the valuation has been put down fraudulently, it cannot refuse to accept the valuation fixed by the plaintiff or the appellant. [p. 125, col. 2; p. 126, col. 1.]

In an appeal by the defendant arising out of a suit for accounts it is open to the appellant to put his own valuation on the appeal and to pay Court-fees accordingly. [p. 128, cols 1 & 2.]

Fiscal enactments must be construed strictly against the Government. [p. 125, cols. 1 & 2.]

In construing a Statute the headings must be ignored and it is only the sections which the Court

is called upon to interpret as being the substantive part of the enactment. [p. 124, col. 2.]

There is no provision in law for a dissolution of a partnership being brought about merely by one partner neglecting to do anything further towards the carrying out of the objects of the partnership. [p. 129, col. 1.]

It is open to a partner to retire from the partnership but the retirement can only be by and upon notice to the other partners. [*ibid.*]

Second appeal from a decree of the District Judge, Cawnpore, dated the 7th April 1924.

Dr. *K. N. Katju* and Mr. *Saila Nath Mukerji*, for the Appellants.

Messrs. *B. K. Mukerji* and *I. B. Banerji*, for the Respondents.

JUDGMENT.

Sulaiman, J.—The preliminary question raised on behalf of the respondents is that the valuation of this appeal is improper. The appeal arises out of a suit for dissolution of partnership which was valued by the plaintiffs for purposes of jurisdiction at Rs. 4,500. The plaintiffs claimed that the partnership may be dissolved and that the defendants may be made to render an account and they asked for a decree for Rs. 4,500 and interest thereon or for any sum which may, on account, be found due. The Court of first instance found that the partnership had been dissolved more than three years before the suit and the claim was barred by limitation. It accordingly dismissed the suit *in toto*. The plaintiffs appealed to the District Judge who took the view that the partnership had not been dissolved on the date of the filing of the suit. He also found that all the defendants were liable as partners. He accordingly reversed the decree of the First Court and directed that a decree be drawn up under O. XX, r. 15 declaring that the partnership shall stand dissolved on the date of his judgment and declaring the shares of the parties as proved and directing the defendant Chunni Lal to render accounts on or before the 15th of July 1924. The appeal before the Judge was valued by the plaintiffs at their original valuation.

Chunni Lal and two other defendants have appealed to this Court from the preliminary decree. They have valued the appeal at Rs. 550 and paid a Court-fee of Rs. 41-4.

The learned Vakil for the respondents has urged before us that the appeal has been wrongly valued. We may note that at the time when the appeal was presented the Stamp Reporter of this Court took no objection to the valuation, nor to the amount of Court-fee paid, and that there has been in this case no reference to the Taxing Officer or the Taxing Judge at all.

The first point to see is whether it is open to the respondents to raise such an objection. I think that the plaintiffs respondents can raise this objection at the hearing of the appeal because the valuation affects not only the jurisdiction of the Court but also the amount of costs and legal fees which would be taxable. In a case where there has been a reference to the Taxing Officer or the Taxing Judge the question of insufficiency of the Court fees as paid on the memorandum of appeal cannot be raised again at the time of the hearing of the appeal for s. 5 of the Court Fees Act would clearly be a bar to say such reconsideration. But where no reference under s. 5 has been made at all the Court hearing the appeal must decide it. This was the view clearly expressed by the Calcutta High Court in the case of *Jugal Pershad Singh* v. *Parbhu Narain Jha* (1) with which I fully agree. A similar question arose before a Full Bench of the Madras High Court in the case of *Dhupati Srinivasacharlu* v. *Perindevamma* (2) and the Bench itself decided it.

The main question is whether it was open to the defendants to put a valuation different from that fixed by the plaintiffs in their plaint. The question is not free from difficulty because there is a clear conflict of opinion between the various High Courts. The Madras High Court has clearly laid down that the valuation once fixed by the plaintiff must be adhered to at subsequent stages unless of course the identity of the subject-matter is different, *vide* the case of *Samiya Mavali* v. *Minammal* (3) and *Dhupati Srinivasacharlu* v. *Perindevamma* (2). The Punjab High Court in the case of *Kanji Mal* v *Panna Lal* (4) and the Calcutta High Court in the case of *Banwari Lal* v. *Sheo Sankar Misser* (5) had inclined towards the same view.

On the other hand there is an observation of Tudball, J., in the case of *In the matter of Bhola Nath* (6) which supports a contrary view though it was not neces-

(1) 8 Ind. Cas. 1145; 37 C. 914.
(2) 33 Ind. Cas. 602; 39 M. 725; 30 M. L. J. 402.
(3) 23 M. 490; 10 M. L. J. 340; 8 Ind Dec. (N. S) 744.
(4) 28 Ind. Cas. 262; 7 P. R. 1915; 15 P. L. R. 1916.
(5) 1 Ind. Cas. 670; 13 C. W. N. 815.
(6) 6 Ind. Cas. 832; 32 A. 517; 7 A. L. J. 546.

sary to decide that point in that case. But in the case of *Kanhaiya Lal* v. *Seth Ram Sarup* (7) Piggott, J., was of opinion that the view of the Full Bench of the Madras High Court was not correct. The case of this High Court has been followed by the Patna High Court in the case of *Kuldip Sahay* v. *Harihar Prashad Jha* (8).

I may point out that the cases, *Kanhaiya Lal* v. *Seth Ram Sarup* (7) and *Kuldip Sahay* v. *Harihar Prasad Jha* (8) are slightly distinguishable because in those cases the defendants when appealing had not appealed from the whole decree but had admitted their part liability. Thus the identity of the subject-matters in the First Court and in the Court of Appeal was not the same. It may, therefore, be said that as there was no valuation by the plaintiff of the subject-matter in dispute in appeal, it was open to the defendant to value it according to his own estimate, whereas in the present case the subject-matter in the suit and in the appeal is identical. In the appeal the relief claimed is that the decree of the Court of first instance dismissing tho suit *in toto* should be restored.

The difficulty is really due to the circumstance that the amendments of the Court Fees Act have not kept pace with the amendments of the C. P. C. In 1870 when the Court Fess Act was passed, Act VIII of 1859 as amended by Act of 1860 was in force. Under those Acts there was no such thing as a preliminary decree distinct and separate from a final decree. Thus, although in a suit disputes might arise as regards the valuation, the matter was bound to have been determined by the time the decree came to be passed. Thus for purposes of appeals it was sufficient to say "according to the amount or value of the subject-matter in dispute." And that is why although there were elaborate provisions as regards the valuation of suits, there were very few for valuation of appeals. There was not even any general section under which principles applicable to suits were made applicable to appeals. Since then the C. P. C. has undergone a marked change. In some cases there can be a preliminary decree followed by a final decree, and an appeal is allowed from the preliminary decree even before any final decree is passed and thus the true value of the subject-matter in dispute may remain unascertained while appeals from preliminary decrees are preferred. The language of the old Court Fees Act is now to be applied to a state of things which could not have arisen in the same acute manner when the Act was passed. Further more, the drafting of some of the sections was not quite happy, as a number of anomalies have crept in which I may briefly point out. Chapter II has the heading "Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns." This obviously applies to all High Courts, as s. 5 of this chapter is invariably applied to the High Court other than those at the Presidency Towns. Chapter III has the heading "Fees in other Courts and in public offices." If these headings were to be accepted as accurate it would seem that Ch. III does not relate to matters pending in High Courts at all, but we find that Ch. III contains many important sections which have invariably been applied to appeals filed in the High Courts. I may refer to the methods of calculating amounts payable under ss. 7 and 8 of that Chapter, the decision of question as to valuation under s. 12, the power to order refund of fee paid on memorandum of appeal under s. 13 as well as other sections of Ch. III. Courts have invariably applied these sections contained in Ch III to appeals pending in High Courts though there is no specific provision in the Act under which these sections are made applicable to appeals in the High Court and though the heading of that Chapter points to a contrary direction.

But it is well-known that in construing a Statute the headings are to be ignored and it is only the sections which the Courts are called upon to interpret as being the substantive part of the enactment. I must, therefore, in accordance with the unifrom practice of all High Courts hold that the principles contained in s. 7 of Ch. III are applicable also to appeals before the High Courts.

Another anomaly is that the opening portion of s. 7 relates to suits and yet there is no other section in the Act which says that principles governing suits will also govern appeals.

A further anomaly is that although in s. 7 sub-ss. (i), (ii), (iii), (v), (vii), (viii), (ix).(x) and (xi) there is no mention of a memo-

(7) 66 Ind. Cas. 841; 44 A. 542; 20 A. L. J. 416; 4 U. P. L. R. (A.) 99; (1922) A. I. R. (A.) 228.

(8) 75 Ind. Cas. 871; 4 P. L. T. 638; (1924) A. I. R. (Pat.) 161; 3 Pat, 146.

randum of appeal, sub-s. (iv) of that section specifically mentions plaint or memorandum of appeal.

And, lastly, although sub-s. (iv) refers to plaint or memorandum of appeal the last two lines of that sub-clause refer to the plaintiff and do not expressly mention the appellant.

The view of the Madras High Court is that in cases where the subject-matter in dispute is not capable of being valued exactly, the plaintiff's valuation must be accepted and the defendant should not be allowed to alter it at subsequent stages. This of course cannot be accepted in its widest scope for it is well-known that if the plaintiff has valued his claim at a certain figure but the decree passed by the first Court is for a smaller amount, the defendant in appeal is not bound by the valuation in the plaintiff. The other view of the Madras High Court that the valuation by the plaintiff in his plaint and by the defendant in appeal ought to be the same where the subject-matter in dispute is identical has certainly some force. After all it is the plaintiff who puts forward a claim, whether it is a true one, a false one or an exaggerated one. The subject-matter in dispute is the amount claimed by the plaintiff no matter whether that claim is just or unjust. It would, therefore, seem quite reasonable to say that when the subject-matters are identical the defendant ought to value his appeal according to the valuation put by the plaintiff in his plaint which really represents the amount claimed by him whether the defendant admits it or not.

On the other hand it must be conceded that in cases coming under s. 7 sub-s. (iv) the valuation made by the plaintiff of the subject-matter in dispute is often an arbitrary one and particularly in a case falling under sub-s. (iv) (*f*) the valuation is a tentative one, it not being known at the time what would be the exact amount found due to either party after the accounts are taken. If under such circumstances the plaintiff fixes a figure arbitrarily and haphazardly which he considers may be found due on account being taken, there is no just ground why the defendant when appealing should be tied down to this haphazard estimate when on the face of it the valuation is merely tentative.

It is a sound rule of interpretation that fiscal Acts should be construed strictly against the Government. The present defendants cannot be called upon to put a higher valuation on their appeal and consequently to pay a larger sum of Court fees unless the provisions of the Court Fees Act clearly require it. Schedule I Art. 1 requires an *ad valorem* fee on the amount or value of the subject-matter in dispute on a memorandum of appeal not otherwise provided for in the Act. The present appeal falls under s. 7 sub-s. (iv) (*f*) and, therefore, the amount of fee payable is to be computed according to the "amount at which the relief sought is valued in the plaint or memorandum of appeal." Taking the words literally the defendants have valued the relief which they seek in their memorandum of appeal at Rs 550. They can, therefore, be called upon to pay Court fees on that amount only. The question remains whether there is anything else in this section which justifies a contrary conclusion. The last words "In all such suits the plaintiff shall state the amount at which he values the relief sought" do not entitle us to import into the section words to the following effect "and the amount stated by the plaintiff shall be the amount for purposes of memorandum of appeal." It is true that the Legislature has omitted to say that the appellant shall state the amount at which he values the relief sought in the appeal and has merely required the plaintiff to state it although sub-s. (iv) clearly refers both to the plaint and the memorandum of appeal. But this omission does not justify an inference that the memorandum of appeal must necessarily have the same valuation as the plaint. It is unnecessary to speculate as to what might possibly have been the reason for omitting the word "appellant" from the last two lines. It is sufficient to say that the defendant cannot be called upon to pay Court fees on the amount of valuation given by the plaintiff when the language of the section does not clearly so demand. The Statute must be construed in favour of the defendant who has to pay the Court-fees. If the Legislature considers that the language is defective, it is for the Legislature and not the Court to cure the defect. The words must be interpreted as they stand.

It follows that in cases where the valuation has of necessity to be arbitrary and tentative, the person who has to present a petition of plaint or appeal and who is called upon to pay the necessary Court

fees will have to fix the valuation, and unless the Court is of opinion that the valuation has been put down fraudulently, it will be difficult not to accept the valuation so made.

I am conscious of the fact that in some cases this interpretation of the section will be unsatisfactory and may lead to inconvenience, *e. g.*, the plaintiff may value his suit for accounts at a certain figure in the First Court and may succeed, the defendent when appealing may value it at another figure and may succeed and then the plaintiff in coming up in second appeal will have to re-value it at the original figure. The absence of uniformity is likely to be embarrassing but the result is due to the drafting of the section as it stands.

I am accordingly of opinion that although it was not absolutely necessary for Piggot, J., in the case before him to go to the extent to which his remarks point because in that case the defendant was appealing from part of the decree only, the view taken by him as to the general principles governing valuation was quite correct. I am, therefore, unable to accept the view expressed by the Full Bench of the Madras High Court in *Dhupati Srinivasacharlu* v. *Perindevamma* (2) and must hold that the valuation made by the defendants cannot be challenged, and that accordingly there is no deficiency in the amount of the Court-fee paid.

Boys, J.—This was a suit for dissolution of partnership and accounts. The plaintiffs valued the suit at Rs. 4,500. The defendants pleaded limitation and that nothing was due. The Trial Court dismissed the plaintiff's suit on the ground that it was barred by limitation. In his appeal the plaintiff again valued his appeal at Rs. 4,500. The lower Appellate Court held that the suit was not barred by limitation, and passed a preliminary decree for accounts.

The defendant has appealed here against the whole decree of the lower Appellate Court and asks for restoration of the decree of the Court of first intance. He has valued his appeal not at Rs. 4,500, the valuation put on the suit and his own appeal by the plaintiff, but at Rs. 550 and has paid Court-fee thereon. On behalf of the plaintiff-respondent objection is taken that the valuation of the appeal should be Rs. 4,500.

We have then, under s. 12 of the Court Fees Act VII of 1870 to determine the question of right valuation. I may note here that the heading to Ch. III suggests that it does not apply to high Courts, but there is internal evidence in the Chapter itself that some of the sections at any rate do so apply : and of course the headings have no binding force in interpreting the sections. The case is admittedly governed by s. 7 sub-s. (iv) clause (*f*) of the Court Fees Act. That section runs as follows, so far as is material for the present purposes :—

" The amount of fee payable under this Act shall in suits for accounts be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal ; in all such suits the plaintiff shall state the amount at which he values the relief sought. "

In *Dhupati Srinivasacharlu* v. *Perindevamma* (2) there was a preliminary decree for accounts followed by an appeal against the whole preliminary decree. The Full Bench following *Samiya Mavali* v. *Minammal* (3) and *Barwari Lal* v. *Sheo Shankarn Misser* (5) held that the defendant was bound by the plaintiff's valuation. I note here that Wallis, C. J., who delivered the very brief judgment of the Court was one of the Judges who had referred the case to the Full Bench on the ground that they felt some doubt about the correctness of the decision in *Samiya Mavali* v. *Minammal* (3) and further that the Full Bench who chiefiy influenced apparenly by the consideration that the decision in *Samiya Mavali* v. *Minammal* (3) had been consistently acted on. Further it may be noted that *Samiya Mavali* v. *Minammal* (3) was a case under s. 7 iv (*c*) while *Banwari Lal* v. *Sheo Shankar Misser* (5) was a case under s. 7 sub-s. (i). The next case is a judgment of Mr. Justice Piggott, reported in *Kanhaiya Lal* v. *Seth Ram Sarup* (7) in which the appeal was only against a portion of the decree. The defendant did not deny his liability to render accounts, which liability he had all along admitted, but he took exception to the decree and contended that it ought to have contained a specification of the period over which the liability to render accounts should extend and the adjudication of a question which the defendant had raised as to the period of limitation applicable to the portion of the plaintiff's claim. Mr. Justice Piggott held that it was open to the defendant-appellant to fix his own valua-

tion and this decision was followed in *Kuldip Sahay* v. *Harihar Prasad Jha* (8). In this latter case the defendant appealed against only so much of the preliminary decree for accounts as gave the plaintiff a right to examine and criticise the accounts. It was held that the relief sought by the defendant was not capable of an exact estimate and that the Court Fees Act, s. 7 sub-s. (iv) clause *(f)* left the defendant-appellant free to fix his own valuation. This brings to the year 1923; since when the matter does not appear to have come before the Courts.

It will be seen that the decision of Mr. Justice Piggott and that noted in the Patna Law Times did not cover the exact point before us. The question in those cases was as to the correct valuation and who should make it when the defendant had appealed only from a portion of the preliminary decree. The case we have before us is an appeal from the whole decree. Such a case is to be found in *Dhupati Srinivasacharlu* v. *Perindevamma* (2) in which the decision was adverse to the defendant appellant and he was held bound by the plaintiff's valuation ; but I have already discussed that case, and am unable to obtain much assistance from it.

A consideration of all the sub-sections of s. 7 would suggest that there is distinction to be found between the suit mentioned in sub-s. (iv) and the other sub-sections of s. 7 in that in the other sub-sections the suit is of a nature that permits of some measure of valuation being fixed upon which is independant of the sole volition of one of the parties, while in sub-s. (iv) it would be very difficult, probably impossible, to find any such measure of valuation ; and it is probably with this in mind that the Legislature inserted in sub-s. (iv) the provision that " the plaintiff shall state the amount," *merely in order to give a starting point* and not with any intention one way or the other that it should or should not govern the appeal whether from the preliminary or the final decree. As to the valuation for the purposes of appeal, the Legislature did not then intend to say, and has not said, any thing as to how the valuation should be arrived at. If this view of what was and what was not present in the mind of the Legislature be correct, it may be the answer to the doubt expressed by Piggott. J., in *Kanhaiya Lal* v. *Seth Ram Sarup* (7) at where he said, "It is no doubt a little difficult to understand why the Legislature should have felt it necessary to add this proviso in respect of the plaintiff without in express terms laying any analogous obligation upon the appellant."

I do not, therefore, in deciding by whom and how the appeal is to be valued, feel myself influenced one way or the other by the omission in the section of the words which Mr. Justice Piggott rightly says might in a certain view have been expected ; and I have merely to consider what is an equitable decision in face of the silence of the Statute, basing my decision on general principles, if I can find any such.

At first sight what appear to be three distinct cases present themselves for consideration :—

(*a*) where the defendant appeals against only a part of the preliminary decree ; and

(1) the plaintiff has not separately valued the two liabilities,

(2) the plaintiff has separately valued the two liabilities,

(*b*) where the defendant appeals against the whole preliminary decree.

I will consider first the case (*a*) where the defendant appeals against only a part of the preliminary decree ; and will then consider whether there is any distinction in the principles applicable between it and case (*b*). Is not case (*a*) analogous to the case where a decree in a suit for money having declared his liability in regard to determined amounts under two heads X and Y, the defendant is content as regards X to accept the decree ; but as regards Y he appeals. He has to pay Court fee only as to Y. He accepts one ascertained liability and objects to another. Similarly, where he appeals against only one condition affecting his alleged liability under a preliminary decree and temporarily accepts the other, there appears no reason why the same principle should not be applicable. Why should he not be made to pay on the valuation of the liability to which he objects and absolved from paying on the valuation of the liability which he temporarily accepts.

The next question for determination is how is the valuation of the liability to which he objects to be made separately ? Here again two cases may arise :—

(1) Where the plaintiff has not separately valued the two liabilities.

(2) Where the plaintiff has separately valued the two liabilities.

In case (1) *i. e.*, where the plaintiff has not separately valued the two liabilities, just as in the cases included in s. 7 sub-s. (iv) the Legislature had, in the absence of any other available measure, to leave it to the plaintiff to value his suit, so, in the absence of any other measure, it must be left to the appellant to value the liability against which he appeals. And, therefore, I find myself in agreement with Mr. Justice Piggott who had this particular case before him. This course further gives a meaning and scope to the words "memorandum of appeal" at the end of s. 7 sub-s. (iv).

Case (*a*) (2) where the defendant appeals against only a part of decree and the plaintiff has already in his suit separately valued the two liabilities, and case (*b*) where the defendant appeals against the whole preliminary decree (and this last is the present case before us) remain. Is there any real distinction between the principles applicable to these two cases and to that in which, as I have already held in agreement with Mr. Justice Piggott, the defendant must be allowed to put his own valuation.

I can find no reason for any variation in principle, if I am right in the view that I have already expressed that no conclusion of any sort on this point can be drawn one way or the other from the last two lines of s. 7 sub-s. (*iv*).

Again, it is not difficult to see that it might not be easy to determine in every case whether the appeal is to be regarded as an appeal against the whole preliminary decree or an appeal against part only of the decree. The appellant might easily refrain from appealing against an entirely negligible portion of the decree against him solely with the deliberate intention of evading the rule if such rule were found to be law, that he must value at the total valuation made by the plaintiff if he appealed against the whole decree. I do not find in principle any marked dividing line.

Further, with the law as now worded, the desirability of uniformity re-inforced by the equitable consideration referred to by Mr. Justice Piggott in *Kanhaiya Lal* v. *Seth Ram Sarup* (7) would suggest that the appellant should be allowed to put his own valuation on his appeal in these two cases also.

The result is that I hold that the defendant-appellant is entitled to put his own valuation on the relief that he seeks.

By the Court.—This is a suit for dissolution of partnership and accounts. The Trial Court held that, as a matter of fact, the defendants were joint in family, mess and estate and that the family was also joint in business and in this business in particular. It further held that the partnership had, in fact, dissolved by the closing up of the partnership business more than three years before the date of suit and, therefore, dismissed the plaintiffs' claim. But the lower Appellate Court while agreeing with the other findings of the First Court decreed the plaintiffs' appeal relying chiefly on Exs. 1 and 2 in which it was stated, according to the lower Appellate Court's reading that the partnership was not to end until all accounts, etc., had been settled up. It, therefore, held that the mere cessation of the business did not amount to the dissolution of the partnership and that the suit was not barred by limitation. We have been addressed really only two points.

The first of these is as to whether the partnership was really dissolved or not at the time the business closed. The words used in the notice given by the plaintiff himself were that 18 months before the date of the notice which was given on the 19th of June 1919, "*dukan utha di gai*" and "*karobar band ho gaya.*" It has been much pressed upon us that this was an admission of a dissolution of the partnership. We are of opinion that such an interpretation is unjustified in view particularly of the special contract as set out in Exs. 1 and 2. The notice in view of those Exhibits was really nothing more nor less than an allegation that all new dealings had, in fact, ceased. Now if the partnership had dissolved it must have dissolved in one way or another recognised by and known to the law. It is admitted that a partnership existed. The plaintiff alleged that it continued to exist, it clearly did continue to exist until it was in some way or another dissolved. In the circumstances the burden was heavily on the defendant to show that it had dissolved. He would in any circumstances have found this burden very difficult to discharge in face of the express terms of Exs. 1 and 2 in which it is in so many words declared

that the defendant shall not leave the business until all accounts etc. have been settled up. Apart even from this, we find that there is no provision in law for a dissolution of the partnership being brought about merely by one partner neglecting to do any thing further towards the carrying on of the objects of the partnership. That is all that appears to have happened in this case.

A partner can retire, but if so, it is clear that that retirement can only be by and upon notice to the other side. In face of the particular terms of Exs. 1 and 2 it may be doubted whether the defendant could even have retired until he had settled up all accounts. In any case it is clear that in this case no notice of his desire to retire from the partnership was even given by the defendant. We hold, therefore, that both on the general circumstances of the case and in view of the terms of Exs. 1 and 2 it is clear that the partnership had not dissolved and that the suit was not barred by limitation.

The second point that was urged before us and is supported by a certificate is that there was no evidence that the family was joint or that the business of the partneship was entered into by the father as the head and manager of the family. Both the lower Courts seems to have read the evidence as if it did establish the fact that the business was on behalf of the family. But we have had the only evidence which has been referred to by the lower Courts or pointed out to us here read to us and it does not appear to us to go further than to suggest that the defendants said to the plaintiff "you see our family and that we are people of substance." We need not, however, enter further into this matter as Mr. B. K. Mukerji on behalf of the plaintiffs-respondents says that he will be content to have a decree passed against the father alone. We do not in any way decide the question of the liability of the son of Chunni Lal under the Hindu Law in respect of his father's debt.

For the above reasons we allow the appeal to this extent that we modify the decree of the lower Appellate Court by dismissing the suit against the defendants other than Chunni Lal. The appeal of Chunni Lal is dismissed. The parties will bear their own costs of this appeal. No Court-fees are necessary.

Z. K. *Decree modified.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 550 OF 1923.

March, 5, 1925.

Present:—Mr. Kotval, A. J. C.

Musammat JANKI SETHANI—DEFENDANT—APPELLANT

versus

Seth LAXMINARAYAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Foreign judgment—Submission to jurisdiction, what amounts to—Application for adjournment—Ex parte *decree, application to set aside—Appeal—Voluntary submission.*

A voluntary appearance by a party in a Foreign Court of Law amounts to a submission to its jurisdiction and deprives the party of the right of disputing the enforceability of the judgment of the Foreign Court in a British Court. [p. 130, col. 2.]

An application by a defendant for an adjournment of the case and to set aside an *ex parte* decree passed against him and an appeal against an order refusing to set aside the decree are all voluntary acts and as such amount to submission to the jurisdiction of the Foreign Court. [*ibid.*]

Case-law referred to.

Appeal against a decree of the District Judge, Hoshangabad, dated the 18th August 1923, in Civil Appeal No. 49 of 1923.

Mr. *P. C. Dutt*, for the Appellant.

Mr. *J. Sen*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was based upon a foreign judgment. The plaintiff who is respondent here admits that the Civil Court in Bhopal State which pronounced it had no jurisdiction to try the suit but he contends that the judgment is binding on the defendant-appellant as she submitted to the jurisdiction of that Court. The acts constituting submission are an application by the defendant for an adjournment of the suit which was disallowed; an application by her to set aside the decree which was subsequently passed *ex parte* and an appeal from the order refusing to set aside the *ex parte* decree which were both dismissed. The defendant does not dispute that the decree is binding on her if she submitted to the Bhopal Court's jurisdiction but she contends that the acts mentioned above, which she admits, do not amount to submission to the jurisdiction of the Court. A further plea by the defendant was that the decree was obtained by fraud. The fraud alleged was that the plaintiff won over her agent Mansukhdas and induced him to give false evidence in his favour.

The lower Appellate Court has held that

the alleged fraud is not proved and that the defendant submitted to the jurisdiction of the Bhopal Court.

As regards the plea of fraud it may at once be disposed of on the ground that the allegations concerning fraud are not proved. Further, fraud which would vitiate the judgment must be fraud practised on the defendant whereby she was prevented from defending the claim in the manner most to her advantage. No such fraud is alleged or proved.

As regards the question whether the acts referred to above amount to submission to the Court's jurisdiction or not the defendant relies on *Sivaraman Chetti* v. *Iburam Saheb* (1), *Keymer* v. *Visvanatham Reddi* (2) and *Gurdyal Singh* v. *Raja of Faridkot* (3). None of these rulings has any application in the present case. *Gurdyal Singh* v. *Raja of Faridkot* (3) was a case where the defendant never appeared in the suit or otherwise submitted himself to the jurisdiction of the Foreign Court. In *Keymer* v. *Visvanatham Reddi* (2), the question for decision was whether the suit had been decided on the merits, a question which is not raised here. In *Sivaraman Chetti* v. *Iburam Saheb* (1), the question whether the defendant submitted himself to the jurisdiction of the Foreign Court was raised. The defendant had employed a Vakil to defend the suit in the Foreign Court of first instance but on the case coming on for hearing the Vakil stated he had no instructions and consequently a decree was passed as prayed for by plaintiff apparently without any evidence being taken. Subsequently, defendant applied to the French Courts to have the *ex parte* decree set aside and a decree to be given on the merits. This application appears to have been acceded to, but, on the case coming on for hearing, the order so passed in defendant's favour was set aside on the ground that the application was barred as not having been made within eight days of the notice of the decision. It was held upon the above facts that there was no submission. This case is noticed in *Shaik Atham Sahib* v. *Daud Sahib* (4) and the learned Judges in that case apparently seemed unwilling to endorse the view of the facts taken in it.

In *Shaik Atham Sahib* v. *Daud Sahib* (4) appearing and applying for leave to defend the action without raising any objection to the Court's jurisdiction was held to be a voluntary submission to the jurisdiction. In *Harchand Panaji* v. *Gulabchand Kanji* (5), the defendant having raised pleas of limitation and non-joinder of parties and some others along with the plea of want of jurisdiction was held to have voluntarily submitted to the jurisdiction.

It is difficult to see how the appearances for the purpose of obtaining an adjournment or for applying to set aside the *ex parte* decree can have been anything but voluntary and did not amount to a submission to the jurisdiction of the Court.

As the defendant was not subject to the jurisdiction of the Court any judgment passed by it in her absence would have done her no harm as it could not have been enforced against her. She was, therefore, not obliged to appear and if she did she appeared voluntarily and submitted herself to the jurisdiction of the Court. *Harris* v. *Taylor* (6) may be cited in this connection. In that case appearance merely to dispute jurisdiction was held to amount to submission. The plaintiff in that case brought an action in the Isle of Man against the defendant claiming damages. The defendant was a resident of England and was not subject to the jurisdiction of the Isle of Man Court. After service of the writ on the defendant in England he appeared "conditionally" and applied to the Court to set aside the writ on the ground amongst others that he was domiciled in England. The application was dismissed. The defendant took no further part in the proceedings and the plaintiff recovered judgment for damages and costs. The plaintiff then brought the suit in England to enforce the judgment. It was held that by reason of his application the defendant had voluntarily submitted to the jurisdiction of the Isle of Man Court and that the judgment was, therefore, enforceable against him in England. Buckley, L. J., observed as follows:—

"The question which we have to decide

(1) 18 M. 327; 6 Ind. Dec. (N. S.) 577.

(2) 38 Ind. Cas. 683; 40 M. 112; 15 A. L. J. 92; 21 M. L. T. 78; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. L. T. 175; 44 I. A. 6 (P. C.).

(3) 22 C. 222; 21 I. A. 171; 4 M. L. J. 267; 6 Sar. P. C. J. 503; 112 P. R. 1894; 11 Ind. Dec. (N. S.) 149; (1894) A. C. 670; 11 R. 340 (P. C.).

(4) 3 Ind. Cas. 190; 32 M. 469; 19 M L. J. 457.

(5) 26 Ind. Cas. 265; 39 B. 34; 16 Bom. L. R. 620.

(6) (1915) 2 K, B. 580; 84 L. J. K. B. 1839; 113 L. T. 221.

on this appeal depends, as I have said, on whether the defendant submitted to the jurisdiction of the Isle of Man Court, and in order to decide that question it is necessary to consider what it was that the defendant did on March 17, when as the record states he appeared conditionally to set aside the writ. When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so. The course adopted by the defendant's Advocate on March 17 was either a qualified appearance or an unqualified appearance. If it can be regarded as a qualified appearance it was an appearance for the purpose of getting a decision of the Court. on the question whether the defendant was bound by the jurisdiction of the Court. The decision was against him, and thereafter it was not open to the defendant to say that he was not bound. The doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the Foreign Court, then the judgment is enforceable against him in this country; see *Schibsby* v. *Westenholz* (7). I think that in this case the defendant did submit himself to the jurisdiction of the Court of the Isle of Man, and, therefore, it was his duty to obey the judgment."

Bankes, L. J., held that the motion to set aside the writ was, undoubtedly, an application by the defendant for the exercise of the protection of the Court on his behalf and that the principle underlying the case of a person who has agreed to submit to the jurisdiction of a Court applies equally to the case of a person who appeals at a preliminary stage to the Foreign Court to relieve him from an obligation which the plaintiff by means of the action seeks to put upon him and that the fact that the defendant has sought the protection of the Court imposes upon him an obligation to obey the judgment of the Court if it should happen that it is given against him.

The decision of the lower Appellate Court is correct. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(7) (1871) 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1743 OF 1924.

June 10, 1925.

Present:—Mr. Justice Sulaiman.

MUHAMMAD YUSUF KHAN—OBJECTOR—APPELLANT

versus

Babu MAHADEO PRASAD—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage suit—Preliminary decree—Final decree—Preliminary decree modified on appeal—Application to amend final decree or to pass new decree—Limitation—Jurisdiction of Court.

A preliminary decree for sale in a mortgage suit was passed on the 30th of May 1916. An appeal was preferred against the decree and the decree was finally modified by the Appellate Court on the 27th of November 1919. In the meanwhile the Court of first instance had passed a final decree on 22nd January 1918. On 20th February 1922 the decree-holder applied to the Court of first instance for preparation of a new final decree or the amendment of the old one in accordance with the preliminary decree passed by the Appellate Court. The Court instead of ordering that a new decree should be prepared on a separate sheet of paper amended the old decree and brought it into conformity with the preliminary decree of the Appellate Court:

Held, that the application of the decree-holder having been made within three years of the date of the preliminary decree passed by the Appellate Court was within limitation and that under the circum-

stances it was open to the Court of first instance either to pass a new decree in accordance with the terms of the preliminary decree passed by the Appellate Court, or to amend the old final decree passed by it and to bring it into conformity with the decree of the Appellate Court and that, therefore, the course adopted by the Court was perfectly justified. [p. 133, col. 1.]

Mr. *M. A. Aziz*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—This is a judgment-debtor's appeal arising out of an execution matter. A preliminary decree for sale was passed on the 30th of May 1916 and an appeal was preferred from that decree to the Court of the District Judge who modified the decree finally on the 27th of November 1919. Between the passing of the decree by the District Judge and the order of the High Court a final decree was passed by the Court of first instance on the 22nd of January 1918. The decree-holder applied for execution of the final decree as originally prepared. This application was, of course, rejected as the decree was based on the preliminary decree which had been modified on appeal by the High Court. Ultimately the decree-holder on the 20th of February 1922 applied to the Court of first instance for preparation of a new final decree or the amendment of the old one in accordance with the preliminary decree passed by the High Court in second appeal. The learned Judge instead of ordering that a new decree should be prepared on a separate sheet of paper amended the old decree and treated it as a decree in favour of the decree-holder. It is noteworthy that the application for the preparation of the final or an amended decree was made within three years of the order passed by the High Court in second appeal. That application was accordingly within time. The present application is for execution of the decree prepared on the 20th of February 1922 and was filed on the 11th of March 1922. The judgment-debtor took the objection that the decree was not executable inasmuch as the Court had no jurisdiction to amend the final decree which was based on a preliminary decree which had been modified on appeal by the High Court. The Court of first instance allowed this objection but on appeal this objection has been overruled.

The learned Vakil for the objector relies on the Full Bench case of *Muhammad Sulaiman Khan* v. *Fatima* (1) and the Privy Council case of *Brij Narain* v. *Tejbal Bikram Bahadur* (2). Both these cases are clearly distinguishable. In the Full Bench case there was a decree passed by the First Court which was affirmed on appeal. As soon as the decree was affirmed on appeal the Court of first instance ceased to have any jurisdiction to deal with the matter. It, however, amended its decree purporting to bring it in accordance with the judgment of the High Court. The Full Bench pointed out that the Court had no jurisdiction to do anything of the kind because it was the Appellate Court alone which had to prepare its own decree and it was that decree which would have to be executed. Similarly in the case before their Lordships of the Privy Council the First Court had passed a decree under s. 88 of the Transfer of Property Act which was appealed against to the High Court and the appeal was partially allowed. The Court of first instance also passed a decree under s. 89 of the Act but as far as I can judge from the judgment this latter decree was not appealed from. Subsequently the Court of first instance amended not only the decree under s. 89 but also the decree under s. 88 by striking out therefrom the provision for future interest. Obviously when the decree under s. 88 had been appealed from to the High Court the Court of first instance had no power to amend it. It, therefore, acted without jurisdiction in doing so. In the present case it has to be noted that the Court of first instance did not purport to amend the preliminary decree which it had passed previously but accepted the preliminary decree as ultimately passed by the High Court. The prayer of the decree-holder was either to prepare a new final decree in terms of the preliminary decree passed by the High Court or to amend the previous final decree so as to bring it in accordance with the preliminary decree. The final decree could not possibly have been prepared by the High Court. It was the First Court only which could prepare it and it had full jurisdiction to prepare it. The present case, therefore, is clearly distinguishable.

In my opinion the two prayers asked for by the decree-holder in his application dated the 20th of February 1922 were

(1) 11 A. 314; A. W. N. (1889) 107; 6 Ind. Dec. (N. S.) 628.

(2) 6 Ind. Cas. 669; 7 A. 507; 10 C. W. N. 667; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 587; 32 A. 295 (1910) M. W. N. 392; 37 I. A. 70 (P. C.

substantially the same. His prayer was that a final decree should be brought into existence which should be in accordance with the High Court's preliminary decree, whether this was a decree prepared on a new sheet of paper and called a new final decree or an amended decree on the old sheet of paper. In my opinion the Court of first instance had jurisdiction to do both. It could prepare a new final decree in terms of the preliminary decree passed by the High Court or it could amend its own final decree (which had never been appealed from) and bring it in accordance with the High Court's preliminary decree. The application was within time and there was no obstacle in the way to the relief being granted.

The decree which was thus prepared can be treated valid in either way and is executable. The appeal has no merits and is dismissed with costs including fees on the higher scale

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1025 OF 1922.

April 1, 1925.

Present:—Justice Sir Ewart Greaves, KT, and Mr. Justice Cuming.

ANANTA DEW ADHIKAR GOSWAMI—PLAINTIFF—APPELLANT

versus

JOYDEB SARMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 10, Sch. I, Art. 44—Person setting up new idol on trust lands, whether trustee de son tort *—Adverse possession—Limitation.*

The mere fact that a person comes to land which originally may have been trust property for an idol and places on that land a new *namghur* and sets up a new idol, does not constitute him a *trustee de son tort* for the original idol that was upon the land. [p. 133, col. 2.]

Section 10 of the Limitation Act has no application to such a case and the ordinary rule of limitation applies. [p. 133, col. 2; p. 134, col. 1]

Moosabhai v. *Yacoobbhai*, 29 B. 267; 7 Bom. L. R. 45, distinguished.

Appeal against the decree of the District Judge, Assam Valley, dated the 5th of July 1921, affirming that of the Subordinate Judge of that District, dated the 4th of September 1920.

Mr. *Gunada Charan Sen* and Babu *Probodh Chandra Kar*, for Syed *M. Saadulla*, for the Appellant.

Babu *Gour Mohan Dutta*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiff against a decision of the District Judge of the Assam Valley confirming a decision of the Subordinate Judge. The suit was brought for a declaration that certain property was subject to a religious endowment and that it belonged to an idol and that the temple formed part of the religious endowment of which the plaintiff was *adhikar* or *shebait*. The lower Appellate Court has found that the plaintiff entirely failed to prove his title and his possession within 12 years of the suit.

The main attack that has been made in this appeal is with regard to the latter finding. It is stated that on the facts adverse possession for 12 years does not bar the plaintiff's suit having regard to the provisions of s. 10 of the Indian Limitation Act. So far as the question of title is concerned we think that the finding is sufficient to dispose of the appeal. The plaintiff sued to recover the land as an *adhikar* of the parent Satra at Kaliabar of which he says the Satra at Karatipar was a branch. Now the learned Judge has found that the parent Satra at Kaliabar was a branch of the Satra at Karatipar and he has accordingly, in my opinion, correctly found that the plaintiff had failed to prove his title. The plaintiff's case was that there was on the land in suit a *namghur* and an idol, that the original idol and its paraphernalia had disappeared that the *namghur* had become dilapidated and had been removed under the Magistrate's order and he alleged that the defendants had come on the land, built a new *namghur* and established a new idol. So far as the question of title is concerned we agree with the learned Judge and think that this finding disposes of the appeal.

But so far as the second question is concerned, in my opinion, s. 10 of the Indian Limitation Act has no application to the facts here. The mere fact that a person comes to land which originally may have been trust property for an idol and places on that land a new *namghur* and sets up a new idol does not, in my opinion, constitute him a trustee *de son tort* for the original idol that was upon the land. We think that under the circumstances, the

ordinary rule of limitation applies. We were referred to the case of *Moosabhai* v. *Yacoobbhai* (1) and to a passege in the judgment of Mr. Justice Tyabji at page 280* as authority for the proposition for which the appellant contends. But in that case as Mr. Justice Tyabji points out at page 281* the person who set up limitation was an express trustee and had taken upon himself the administration of the trust and had taken possession of the trust property. Under circumstances like these clearly it was not open to such person to plead that he was entitled by adverse possession for 12 years to resist the suit for he himself had acknowledged the existence of the trust but in the case before us we find that there was no such acknowledgment and that no trust relationship between the defendants and the original idol existed at the time of the suit. Consequently, in my opinion, s. 11 of the Limitation Act has no application to the facts of this case.

In the result the appeal fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 29 B. 267; 7 Bom. L. R. 45.

*Pages of 29 B.—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 249 OF 1925.

June 11, 1925.

Present:—Mr. Justice Sulaiman.

HARAKH SONAR—PLAINTIFF—APPELLANT

versus

Babu GOPI KISHUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 95—Execution of decree—Auction-sale– Purchaser, remedies of—Possession obtained by purchaser, effect of—Person having no title to property sold, whether can eject purchaser.

An auction-purchaser has two remedies open to him for recovery of possession of the property purchased by him. He may either have recourse to a summary remedy and apply to the Court under O. XXI, r. 95 of the C. P. C., for delivery of possession against the judgment-debtor or instead of seeking that summary remedy he may bring a regular suit for recovery of possession against his judgment-debtor for which the period of limitation would be 12 years. Even if the summary remedy is barred by time his remedy to bring a regular suit for recovery of possession is not barred till 12 years have expired. If before the expiry of the time allowed for this other remedy he somehow or other obtains possession of the property he cannot be ousted therefrom by a person who in the eye of the law has no title to the property. [p. 135, cols. 1 & 2.]

Defendant obtained a simple money-decree against the plaintiff's father and attached a one-fourth share in certain joint family property which belonged to the judgment-debtor and his brothers. The share was put up for sale and was purchased by the decree-holder himself. The decree-holder did not apply for delivery of possession during the lifetime of the judgment-debtor. After his death the brothers of the judgment-debtor brought a suit for partition against the decree-holder impleading the plaintiff as a defendant. In the final decree passed in the suit a lot consisting of a one-fourth share in the property was allotted to the defendant. After this decree defendant applied to the Execution Court and got a formal delivery of possession of the property allotted to him. Plaintiff filed an objection to the application for delivery of possession, which was dismissed. He then brought a suit for recovery of possession of the property of which possession had been taken by the defendant on the ground that the application for delivery of possession made by the defendant to the Execution Court was barred by time :

Held, (1) that the defendant having obtained possession of the one-fourth share allotted to him in the partition decree to which the plaintiff was a party, the plaintiff had no right to recover possession of the property from the defendant ; [p. 135, col. 1.]

(2) that in any case the defendant being the purchaser of the one-fourth share at auction in execution of his decree and having somehow obtained possession of that share the plaintiff who had no title to the property could not successfully oust the defendant from possession of it. [p. 135, col. 2.]

Second appeal against a decree of the Additional Subordinate Judge, Azamgarh, dated the 15th October, 1924.

Mr. *Ambika Prasad*, for the Appellant.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession. The suit could have been dismissed on the ground much simpler than the one on which the lower Appellate Court has dismissed it, though even that ground is sound.

The defendant obtained a simple money-decree against the plaintiff's father and attached his one-fourth share in a joint family property which belonged to the father and his brothers. Under the Privy Council ruling of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), the father's interest could be attached and seizad in his lifetime. It was put up for sale and purchased at auction by the decree-holder himself. The decree-holder, however, did not apply for delivery of possession and the father died. Subsequently the plaintiff's uncles brought a suit for partition against the decree-holder purchaser impleading the present plaintiff as a

(1) 5 C. 148 at pp. 174; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P C.).

defendant. In this partition suit four lots were prepared and one lot consisting of a one-fourth share was allotted to the defendant who had purchased the share of the plaintiff's father. This decree became final. After this decree defendant applied to the Execution Court and got a formal delivery of possession on the 24th of October 1922. Subsequent to the delivery of possession the present plaintiff filed an objection to the Court saying that the application for delivery of possession was barred by time inasmuch as it had been filed more than three years after the sale. The Court, however, dismissed the objection and upheld the delivery of possession against the plaintiff. The plaintiff has now brought a separate suit for recovery of possession and the main ground on which the suit is based is that the application for delivery of possession was barred by time and, therefore, he is not bound by the proceedings relating to the delivery of possession. His contention, in my opinion, cannot be accepted.

The first difficulty in the way of the plaintiff is that under a partition decree to which he himself was a party the defendant has been given one-fourth share in a separate lot. In some way or other assuming that it was an irregular way the defendant has succeeded in obtaining possession of this one-fourth share allotted to him. In face of the partition decree the plaintiff who has no title has no right to recover it back from him. The suit, therefere, ought to be dismissed on this simple ground.

The lower Appellate Court has, however, dismissed it on the ground that though the decree obtained by defendant for the possession of the house had become incapable of execution by lapse of time, the right established by it remained, and though such right could not be enforced by execution through Court the defendant could enter by ousting any trespasser including the plaintiff. Here again the lower Appellate Court's language is altogether inaccurate. The execution did not become barred by lapse of time. The decree had been fully executed and the property had been put up for sale and sold. It was not the execution which was barred by time but the application for delivery of possession of the property purchased by the auction-purchaser. The ground underlying the decision of the lower Appellate Court, however, still holds good. The auction-purchaser has two remedies open to him. He may either have recourse to a summary remedy and apply to the Court under O. XXI, r. 95 for delivery of possession against the judgment-debtor or he may not seek that summary remedy but may bring a regular suit for recovery of possession against his judgment-debtor for which the period of course would be 12 years. It is, therefore, manifest that even if his summary remedy be barred by time his remedy to bring a regular suit for recovery of possession is not barred till 12 years have expired. If before the expiry of the time allowed for this other remedy he somehow or other obtains possession of the property he cannot then be ousted by a person who in the eye of the law has no title.

The learned Vakil for the appellant has relied on the case of *Ram Dulari* v. *Balakram* (2). That case is distinguishable in the first place because there it was the judgment-debtor who had brought a suit for partition and not the decree-holder purchasing himself. Furthermore, in the present case the interest of the plaintiff's father had been attached in his lifetime, which must be deemed to be a distinct and separate property. When that interest was put up for sale and sold then *prima facie*, in spite of the words 'right, title and interest' of the judgment-debtor in the proclamation of sale, the whole interest of the family represented by the plaintiff's father passed; *vide* the case of *Sripat Singh Dngar* v. *Prodyot Kumar Tagore* (3).

The appeal is accordingly dismissed under O XLI, r. 11.

Appeal dismissed.

Z. K.

(2) 27 Ind. Cas. 696; 13 A. L. J. 105; 37 A. 120.

(3) 39 Ind. Cas. 252; 15 A. L. J. 147; 33 M. L. J. 133; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 140 OF 1924.

March 18, 1925.

Present :—Mr. Findlay, Offg. J. C.

JAIRAM AND OTHERS—PLAINTIFFS —APPELLANTS

versus

ADKU—DEFENDANT—RESPONDENT.

Execution of decree—Decree, whether can be executed in part.

Where a part of a decree has by flux of time, for which the decree-holder is in no way responsible, become impossible of execution, the decree-holder is not barred from executing the other portions of the decree provided they are independent of the portion which has become barred [p. 137, col. 2; p. 138, col. 1.]

Appeal from a decree of the District Judge, Bhandara, dated the 7th January 1924, in Civil Appeal No. 79 of 1923.

Mr. *V. R. Pandit*, R. B., for the Appellants.

Mr. *N. G. Bose*, R. B., for the Respondent.

JUDGMENT.—The present second appeal raises a somewhat interesting point as regards the execution of a portion of a decree only. The four plaintiffs appellants appeal against an order of the District Judge, Bhandara, dated the 7th of January 1924, refusing to allow execution of a part of the decree, which the plaintiffs-appellants held against their judgment-debtor Adku, who is the respondent in this Court. The said order of the District Judge reversed in turn an order of the Subordinate Judge, First Class, Bhandara, which had allowed in the first instance execution of part of the decree.

The facts of the case are, shortly, as follows: The plaintiffs-appellants had sued for specific performance of a contract of lease of the lac of the Pathri jungle, which was evidenced by Ex. P-1, dated the 5th of February 1920. Under this contract the said lease was to enure for some three years, beginning with the summer crop of 1919-20. The consideration for the lease was to be Rs. 3,500, of which Rs. 50 was paid as earnest money at the time. For reasons I am not concerned with, the First Court dismissed the suit. On appeal to the Court of the District Judge, Bhandara, the Subordinate Judge's judgment and decree were reversed and the plaintiff's claim was decreed on the 19th of September 1921. Under this decree it was directed that the defendant should execute the deed of lease according to the conditions set forth in the agreement (Ex. P-1) subject to his receiving Rs. 3,450 from the plaintiff. In addition Rs. 100 damages were decreed in respect of the plaintiffs having lost the summer crop of lac of the *fasli* year 1329, which was included in the terms mentioned in the lease In addition, an order was passed for the payment of a certain amount of costs by the defendant to the plaintiffs.

On the 5th of January 1922 the defendant-respondent Adku applied for stay of execution of the decree on the ground that he had filed a second appeal in this Court. On the 3rd of February 1922 the stay of execution was granted subject to certain conditions as to the plaintiffs-decree-holders being allowed to keep a watch on the jungle in question as to there being checks on the judgment-debtor Adku removing any lac from the forest. The second appeal of Adku was dismissed by Hallifax, A. J. C., without notice to the respondents on the 19th of April 1922. On the 6th of September 1923 the present appellants applied for execution of the decree so far as the order for payment of Rs. 100 damages and of costs was concerned. The judgment-debtor Adku's Counsel on the 12th of October 1923 pleaded that his client was unaware of the result of his second appeal to the High Court, but at a subsequent hearing it was discovered that the said second appeal had been dismissed. The Subordinate Judge then proceeded to execute the decree until the execution proceedings ceased as a result of the lower Appellate Court's order, which is the subject of this appeal.

As is evident from the order appealed against, the learned District Judge has proceeded entirely on the strength of the decision in *Fatehchand* v. *Panna Lall Bania* (1). It seems to me, however, that he has gravely misapprehended the real meaning of the decision in question. Stevens, J. C., in the said case obviously relied on the case of *Huro Sunkur Sandyal* v. *Taruck Chunder Bhuttacharjee* (2), but, in my opinion, if the latter decision be examined carefully, it is really unfavourable to the position which the defendant-respondent takes up in this appeal. Peacock, C. J., at page 490* of the said case remarks as follows:—

"I do not mean to say that a person may not apply for execution of part of a decree, if he admits that the remainder has been satisfied; nor do I mean to say that, where a decree is perfect for execution in certain respects and imperfect in other respects, that execution may not be taken out for the portion which is perfect. For instance, a decree-holder may obtain a decree to recover possession of lands and for *wasilat* to be assessed in execution. The decree cannot be executed as regards the

(1) 10 C. P. L. R. 83.
(2) 11 W. R. 488; 3 B. L. R. A. C. J. 114.
*Page of 11 W. R.—[*Ed.*]

wasilat until it is ascertained. That ought not to prevent the execution-creditor from applying to execute the decree as to that portion which is perfect and seizing in execution the land which has been decreed to him. But after the decree is perfect for execution in its entirety, as for instance in the case just put, after the *wasilat* had been assessed and fixed, I apprehend that the execution-creditor cannot take out one execution for the *wasilat*, another for the costs and another for the interest on the costs."

Now, what was the real position in the present case? The agreement (Ex. P-1) related to the performance of a lease for 3 years beginning from 1919-20. In the meantime, on the initiative of the defendant-respondent, execution has been stayed on the ground of his second appeal, and this order of stay of execution remained in force until after the application for execution, I am concerned with, had been filed on the 6th of Sepember 1923. The learned District Judge has remarked that the present case is parallel to the *Fatehchand* v. *Panna Lall Bania* (1) quoted above, inasmuch as here no time was fixed for the payment of the money, nor was any condition laid down as to the non-payment of the amount. This can hardly be said to be correct, for, in effect, the execution of the lease, at any rate by 1923, would have amounted to nothing more or less than a useless formality, for the period for which the lease was to run had already expired. It would thus have been utterly futile for the decree-holders to have asked for the specific performance of the decree, for the period during the lease was to run had already expired. It must be remembered also that there is nothing to show, nor indeed has it been urged on behalf of the respondent that there was any *laches* on the part of the present appellant in applying for execution of the decree. As I have already shown, it was on the application of the defendant-respondent himself that execution of the decree had been stayed.

The learned Counsel for the defendant-respondent has urged that if the plaintiffs-appellants are granted a decree for Rs. 100 damages, they will, in effect, receive this amount without having paid to his client the consideration of the lease. This argument does not appear to be of any great force. The defendant-respondent himself is clearly responsible for the fact that the whole decree has not been executed. Rs. 100 of account of damages was awarded in respect of the defendant-respondent's wrongful act in not carrying out the terms of the agreement (Ex. P-1). Such a consideration, therefore, seems to me to be of no real weight. It would be just as open to the plaintiffs-appellants to argue that they have been out of pocket for several years of the Rs. 50, earnest money, which they paid.

Again, another contention has been urged on behalf of Adku to the effect that the plaintiffs' proper course is to deposit the balance of the consideration, Rs. 3,450, ask for specific performance for execution of the lease, and then claim damages by a separate suit in respect of the lac crop for the remaining period the lease had to run. I cannot concur in any such suggestion, which seems to me equally opposed to the mandates of both law and equity, not to mention common sense. The execution of the lease, after the period covered by it, would be nothing more than a worthless and useless formality.

The real mistake made by the lower Appellate Court in dealing with this case was in its regarding the decree we are concerned with, as one perfect for execution in its entirety. As I have already shown, the decree was nothing of the sort, and circumstances have occurred, for which the present appellants were in no way responsible, which have rendered it impossible for them to ask for execution of the part of the decree relating to specific performance of the lease (Ex. P-1). The other two parts of the decree can, however, obviously be executed independently of the portion relating to the matter of specific performance, and I know of no rule of law or of equity which should prevent the present appellants from executing the portion of the decree relating to the damages and of costs.

The decision in *Fatehchand* v. *Panna Lall Bania* (1) was obviously never intended by Stevens, J. C., to bear the interpretation which the respondent has attempted to place on it. There the question was whether the plaintiff could be allowed voluntarily to split up his decree and to take out execution of only a portion thereof while deliberately refraining from executing the other portion in which the benefit was subject to an onerous condition. The present case, as I have attempted to show, is entirely different. Part of the decree

has by flux of time, for which the decree-holders were in no way responsible, become impossible of execution; but this fact in no way bars the present plaintiffs-appellants from executing the other portions of the decree, portions which are now entirely independent of the matter of specific performance.

The appeal is accordingly allowed. The order of the lower Appellate Court is reversed and the case will go back to the First Court which will proceed to dispose of the application for execution, dated the 6th of September 1923. The defendant-respondent will bear the plaintiffs-appellants' costs both in this and in the lower Appellate Court. Costs in the First Court will be awarded according to the discretion of the Judge thereof.

G. R. D. *Appeal allowed.*
Z. K.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2315 OF 1922.

February 10, 1925.

Present:—Mr. Justice Harrison.

VAISHNO DAS AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

THE FIRM TIRATH DAS-JAMNA DAS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 37, 50—Decree against firm, whether can be executed against members individually—Service on members, proof of—Arrest of judgment-debtor, application for—Attachment, previous, absence of, effect of.

Where a decree is obtained against a firm the decree-holder is entitled to proceed against individual members of the firm in execution of the decree without making an application under r. 50 of O. XXI of the C. P. C., if he can show that the individual members of the firm were individually and personally served.

There is nothing illegal in an application for arrest of the judgment-debtor whether or not there has been a previous attachment of the judgment-debtor's property.

First appeal from an order of the Sub-Judge, Amritsar, dated the 4th July 1922.

Dr. *Nand Lal*, for the Appellants.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.—The facts of the case are very simple. A decree was given against the Firm Vaishno Das-Parma Nand and the decree-holder proceeded to execute it against the individual members contending that the decree had been passed against them individually and not against the firm. The Subordinate Judge held that this was so and ordered attachment to be made from the personal property of these three men. On appeal to this Court it was held *ex parte* that the suit was against the firm and no application having been made under O. XXI, r. 50 and nobody being present to urge that the decree-holder claimed the benefit of this rule, the appeal was accepted. That order was set aside and at the hearing of the appeal Counsel points out that it is unnecessary to quote O. XXI, r. 50, though it would doubtless under the circumstances be desirable that the decree-holder should do so and if he can show that individual members of the firm were individually and personally served he is entitled to the relief he claimed. He also urges that the decree is not against the firm.

On this latter point I take the same view as taken before and as to the applicability of O. XXI, r. 50, I think he is right and as the record shows that all three members were served individually the decree may be executed against them personally in spite of the firm being insolvent.

Dr. Nand Lal contends that the result of the firm being declared insolvent is to render all members of that firm equally insolvent and to endow them individually and personally with the advantages which accrue from an adjudication. He also contends that the substituted service was no service for the purpose of O. XXI, r. 50, and that the record does not show that there was any substituted service; the words "substituted service has been effected" not being a sufficient reason for holding that this was done. I find that there is no force in these contentions.

The order of the Subordinate Judge was that the application for arrest would bear no fruit until attachment had been made. There is nothing illegal in an application for arrest whether or no there has been a previous attachment, and I direct the Subordinate Judge to issue notice under O. XXI, r. 37, and to proceed in accordance with the law. Under the circumstances of the case I order that half of the costs of the appeal of the decree-holder will be paid by the judgment-debtor.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND MISCELLANEOUS CIVIL APPEAL No. 49 OF 1924.

February 25, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

THE BENGAL AND NORTH-WESTERN RAILWAY CO., LTD. THROUGH ITS AGENT AT GORAKHPORE —DEFENDANTS— APPELLANTS

versus

SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR—PLAINTIFFS— RESPONDENTS.

Railways Act (IX of 1890), ss. 77, 140—Suit to recover compensation for non-delivery of goods—Notice, whether necessary—Mode of service of notice—"May" in s. 140, meaning of.

The mere fact that a person who sues a Railway Company for compensation for non-delivery of goods consigned to the Company for carriage puts forward a case of non-delivery only does not necessarily lead to the conclusion that it is not a case of the loss of the goods. The fact of non-delivery is the effect which may ensue from several causes, for instance, from wrongful detention or from loss of the goods. The distinction between loss and non-delivery for purposes of Arts. 30 and 31 of Sch. I to the Limitation Act does not justify a conclusion that the word "loss" in s. 77 of the Railways Act excludes non-delivery of the goods. A claim for compensation for non-delivery without more, merely asserts that the goods were not delivered at the agreed time or within a reasonable time. Such a claim asserts nothing as to the cause of non-delivery. Where wrongful detention is not pleaded or put in issue a claim merely for compensation for non-delivery must be understood as including or involving a claim for compensation for the loss of the goods within the meaning of s. 77 of the Railways Act, and the plaintiff must serve a notice upon the Railway Company in accordance with the provisions of that section. [p. 139, col. 2; p. 140, col. 1.]

The word "may" in s. 140 of the Railways Act is used because the law allows notice to be served in one of the three modes laid down in the section. It gives an option to the person who is required to give notice to choose any one of the three modes prescribed therein. If a notice is not served in compliance with any of the three modes mentioned in the section it must be held that there is no notice in law. [p. 140, col 2.]

Case-law referred to.

Second miscellaneous appeal against an order of the Additional Sub-Judge, Gonda, dated the 5th September 1924, reversing that of the Munsif, Utraula at Gonda, dated the 27th May 1924.

Mr. *G. N. Mukerji*, for the Appellants.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought by the respondents against the appellant B. & N.-W. Railway Company for recovery of Rs. 992-11-0 as the price of certain goods which the respondent had delivered to the appellant Company for carriage by Railway. The goods have not been delivered to the appellants at the destination. One of the defences and the only defence with which I am concerned was that the suit was bad for want of notice required by s. 77 of the Railways Act, 1890. The plaintiff's rejoinder to this defence was that notice had been issued to the Traffic Manager of the Company at Gorakhpur where the Agent of the Company also lives and in the circumstances of the case that notice was sufficient. Further that no notice is required by law in respect of a claim for compensation for mere non-delivery of the goods. The Court of first instance accepted the defence and dismissed the suit without trying other issues in the case. On appeal by the plaintiffs the learned Additional Subordinate Judge of Gonda accepted the appeal, set aside the decree of the Court of first instance and remanded the case under O. XLI, r. 23 of the C. P. C. for decision on merits. This is an appeal from that order of the learned Additional Subordinate Judge.

On behalf of the appellants the sole argument raised was that the nature of the case was such as required the notice enjoined by s. 77 of the Railways Act. In reply the learned Counsel for the respondent raised also the plea that the notice as given was sufficient compliance with the law.

As to the first point the lower Appellate Court has proceeded on the ground that the case was one of compensation for non-delivery and not for the loss of the goods and, therefore, no notice under s. 77 was necessary. I am unable to agree with the view taken by the lower Appellate Court. To my mind the mere fact that the plaintiff put forward a case of non-delivery only does not necessarily lead to the conclusion that it is not a case of the loss of the goods. The fact of non-delivery is the effect which may ensue from several causes. Such a cause may be wrongful detention or loss. In the present case the plaint does not state that the non-delivery was due to the loss of the goods, but there is no allegation either that it was due to wrongful detention. On the other hand there is evidence on the record to show that the claim which the plaintiff-respondent originally put forward was a claim for compensation for the loss,

(See Ex. 6). The lower Appellate Court in support of the view which it has taken has referred to the decision of a Single Judge of the Patna High Court in the case of *East Indian Railway Company* v. *Messrs. Kali Charan-Ram Prashad* (1) and a similar decision of the Court of the Judicial Commissioner of Nagpur in the case of *Seth Mulchand* v. *Agent, G. I. P. Ry. Co., Bombay* (2). In the case of *East Indian Railway Company* v. *Messrs. Gopiram Gourishankar* (3), the Patna High Court has dissented from the view taken in the case relied upon by the learned Subordinate Judge and on its own merits that is a decision which, I say respectfully, does not commend itself to me. The reasoning underlying that decision has been adversely commented upon by their Lordships of the Calcutta High Court in the case of *Assam Bengal Railway Co., Ltd.* v. *Radhika Mohan Nath* (4). I agree with the view taken in the Calcutta case that the distinction between loss and non-delivery in Arts. 30 and 31 of the Limitation Act does not justify a conclusion that the word "loss" in s. 77 of the Railways Act excludes non-delivery of the goods and I also agree with the opinion expressed by Richardson, J., that "a claim for non-delivery without more, merely asserts that the goods were not delivered at the agreed time or within the reasonable time. Such a claim asserts nothing as to the cause of non-delivery," and the further opinion that "where detention is not pleaded or put in issue a claim simpliciter for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of s. 77." In the case of the *Madras and Southern Marhatta Railway Company, Limited* v. *Hardoss Banmali Doss* (5), their Lordships of the Madras High Court held that notice under s. 77 was necessary in a claim of compensation for wilful delivery of goods to a person not entitled to them.

As to the second point the learned Subordinate Judge has decided it in favour of the defendant Company. Before me it is argued that s. 140 of the Railways Act is merely an enabling provision and is not exhaustive of the class of persons on whom notice may be served. The argument is based on the word 'may' used in s. 140. I am unable to accept the contention. The word 'may' is used because the law allows notice to be served in one of the three modes laid down in the section. It gives an option to the person who is required to issue the notice to choose any one of the three modes prescribed therein. To express that option the Legislature has used the word 'may'. If a notice is not served in compliance with any of the three modes mentioned in the section it must be held that there is no notice in law. This interpretation of s. 140, was made by the Allahabad High Court in the case of *Cawnpore Cotton Mills Co., Ltd.* v. *Great Indian Peninsular Railway* (6). It may be pointed out that the word 'may' in certain circumstances means 'shall' to use the langage of Lord Cairns in the case of *Julius* v. *Lord Bishop of Oxford* (7): "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so", per Lord Phillimore in the case of *Alcock Ashdown and Company Limited* v. *Chief Revenue Authority of Bombay* (8).

The respondent's learned Counsel referred to certain printed clauses on the back of the Railway receipt Ex. W-5 as showing that the Company has allowed notice required by the Act to be served on the Traffic Manager to whom power is given to settle claims for compensation. In the first place I am not prepared to construe those clauses in the sense in which the learned Counsel reads them. In the second place those clauses cannot be given the effect of overriding the clear words of the Statute.

(1) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106.
(2) 79 Ind. Cas. 602; (1924) A. I. R. (N.) 288.
(3) 73 Ind Cas. 642; (1924) A. I. R. (Pat.) 315.
(4) 72 Ind. Cas. 714; 28 C. W. N. 438; (1923) A. I. R (C.) 397.
(5) 49 Ind. Cas. 69; 41 M. 871; 35 M. L J. 35; 24 M. L. T. 38; 8 L. W. 340.
(6) 71 Ind. Cas. 614; 45 A. 353; 21 A. L. J. 223; (1923) A. I. R. (A.) 301.
(7) (1880) 5 A. C. 214; 49 L. J. Q B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.
(8) 75 Ind Cas. 392; 50 I. A. 227; 21 A. L. J. 689; 25 Bom. L. R. 920; (1923) M. W. N. 557; (1923) A. I. R. (P. C.) 138; 33 M. L. T. 267; 45 M, L. J. 592; 47 B. 742; 18 L. W. 918; 39 C. L. J. 302; 28 C. W. N. 762 (P. C.)

The result is that I allow this appeal set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs throughout.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1375 OF 1922.

February 19, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

Shaikh TALEB ALI—DEFENDANT—APPELLANT

versus

Shaikh ABDUL RAZACK AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Hindu Law—Migration—Personal law, presumption of, if rebuttable—Dayabhaga Law—Prostitutes—Stridhan *property—Inheritance.*

The presumption that a Hindu migrating from one place to another carries with him his personal law, is rebuttable. [p. 142, col. 1.]

The mere fact that a Hindu governed by the Dayabhaga Law has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood; and consequently her *stridhan* property passes upon her death according to the law of succession laid down under the Dayabhaga. [p. 142, col. 2.]

Hari Lal Singh v. *Tripura Charan Roy*, 19 Ind. Cas. 129; 40 C. 650; 17 C. W. N. 679; 17 C. L. J. 438, *Sarna Moyee Bewa* v. *Secretary of State for India*, 25 C. 254; 2 C. W. N. 97; 13 Ind. Dec. (N. S.) 171, and *Tripura Charan Banerjee* v. *Hari Mati Dasi*, 9 Ind. Cas. 657; 38 C. 493; 15 C. W. N. 807, relied on.

Meenakshi v. *Muniandi Panikkan*, 25 Ind. Cas. 957; 38 M. 1144; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353, distinguished.

Hindu Law makes no distinction between rules of succession applicable to the property of a Hindu degraded woman and that of a respectable woman. [*ibid.*]

According to the Dayabhaga School of Hindu Law the son succeeds to the *stridhan* property of his mother in preference to the married daughter. [p. 143, col. 1.]

Appeal against a decree of the First Additional District Judge, Midnapore, dated the 5th of May 1922, reversing that of the Munsif, Second Court, Midnapore, dated the 5th of September 1921.

Mr. *Amarendra Nath Bose* and Babu *Apurba Charan Mukerjee*, for the Appellant.

Mr. *Mahendra Nath Roy* and Babu *Santosh Kumar Pal*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This appeal arises out of a suit for rent for the years 1326 to 1328. The defendant denied the relationship of landlord and tenant between the plaintiffs and themselves and set up their own title. They succeeded in the First Court but the learned Additional District Judge of Midnapore decreed the plaintiffs' suit. The present appeal is by the defendants and four points have been urged by the learned Advocate appearing on their behalf.

The property in suit, it appears, belonged to one Kirtibash Maity, who had in his keeping a woman of the name of Saraswati Debi. He executed a deed of gift of the property in suit in favour of his Mistress in 1915. He left two children by Saraswati—a son Rampado and a daughter Haripriya. After that Saraswati died leaving these two children behind her—Haripriya having been married before her death. On the 16th October 1920, the plaintiffs purchased the entire property from Rampado and on the 30th March 1921, the defendants purchased the entire property from Haripriya. The plaintiffs have brought this suit for recovery of arrears of rent on the allegation that the property devolved upon Rampado and as purchasers from him they are entitled to receive rent from the defendants who admittedly were the tenants on the land under Saraswati, and have since been in occupation of it. The defence as made out in the written statement was that Rampado was not born of the womb of Saraswati and, therefore, he was not her heir and that the purchase by the plaintiffs from Rampado was not genuine. The Trial Court dismissed the plaintiffs' suit on the ground that Saraswati was an up-country woman and presumably governed by the Mitakshara School of Law and as under that School the daughter is the preferential heir in respect of the *stridhan* property, Rampado did not inherit any interest in it and, therefore, the purchase by the plaintiffs did not give them any title to the property. On appeal the learned Additional District Judge has not given effect to this plea on the ground that it was not raised in the pleadings and that it was only brought out in the cross-examination of one of the plaintiffs' witnesses that Saraswati's father was an up-country man. The learned Judge notes that the witness after making the statement added that he did not know whether Saraswati's father was governed by the Mitakshara Law or not.

In the first place, the learned Advocate for the defendants pressed for our consideration the point that Saraswati being governed by the Mitakshara School of Law, succession to her property should be governed by that law. I am of opinion that the view taken by the learned Judge is correct and that we should not allow the defendants to raise this question at a late stage. I observe in the pleadings that the plaintiffs' title was questioned only on the grounds, first, that Rampado was not a son born of the womb of Saraswati, and secondly, that the purchase by the plaintiffs was not genuine. No suggestion was made in the written statement that the plaintiffs' right could be challenged on any other consideration such as that the son of a person governed by the Mitakshara Law has no right in preference to the daughter to succeed to *stridhan* property. It is, undoubtedly, a question of fact. The presumption that a Hindu migrating from one place to another carries with him his personal law is a rebuttable one. Since the defendants did not attack the plaintiffs' title on this ground, the plaintiffs were unable to adduce any evidence to show by what law Saraswati was governed.

It is argued in the second place that even if the woman Saraswati was governed by the Dayabhaga School of Hindu Law, she being a prostitute her daughter is to be preferred to her son according to the law of inheritance that governs Hindu women who have taken to prostitution. This point, too, was not raised in the pleadings and it was not taken in any of the Courts below. We have, therefore, not the advantage of the opinion of the Courts below who are in touch with the parties and the evidence. But it is urged that it is a pure question of law and the plaintiffs in order to succeed in this suit must prove their title strictly. We have, therefore, allowed the learned Advocate for the appellants to argue this point. No authority has been placed before us in support of this contention nor any text from any original authority on Hindu Law. But reliance is placed upon certain observations in the Hindu Law of *Stridhan* and Marriage by Sir Gurudas Banerjee, 5th Edition, at page 458. There the learned author deals with the succession of property of dancing women. It is not necessary to go into the cases in which a similar point came up for consideration as the question seems to have been set at rest by the Full Bench decision of this Court in the case of *Hari Lal Singh* v. *Tripura Charan Roy* (1) which holds that the mere fact that a Hindu has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood; and consequently her *stridhan* property passes upon her death according to the law of succession laid down under the Bengal School of Hindu Law. The judgment of the Full Bench is based upon the theory approved by that decision that the Hindu Law makes no distinction between rules of succession applicable to the property of a Hindu degraded woman and that of a respectable woman. This view so adopted in the Full Bench case has called for some severe criticism at the hands of the Editor of Sir Gurudas Banerjee's book. But it is worthy of note that in the case of *Sarna Moyee Bewa* v. *Secretary of State for India* (2), to which Sir Gurudas was a party, it was held that a woman of the town who is Hindu by birth does not cease to be a Hindu by reason of the degradation and succession to her property is governed by the Hindu Law. The law as regards dancing women has been properly characterised as peculiar to the Presidency of Madras as was observed in the case of *Sarna Moyee Bewa* v. *Secretary of State for India* (2) already referred to and it is admitted by the Madras High Court in the case of *Meenakshi* v. *Muniandi Panikkan* (3) that the law of succession as obtaining in that Presidency to the estate of dancing woman is based upon local custom and usage. As a matter of fact, as the learned Advocate for the respondent rightly points out there is no departure in that Presidency from the ordinary Hindu Law of succession even in the case of dancing girls, for in that Presidency Mitakshara School of Hindu Law prevails and according to that law as regards *stridhan* property the daughter is preferred to the son. The nearest approach to the facts of the present case is the case of *Tripura Charan Banerjee* v. *Hari Mati Dasi* (4), the decision of which covers a portion of the points raised in this case. This case was

(1) 19 Ind. Cas. 129; 40 C. 650; 17 C. W. N. 679; 17 C. L. J. 438.

(2) 25 C. 254; 2 C. W. N. 97; 13 Ind. Dec. (N. S.) 171.

(3) 25 Ind. Cas. 957; 38 M. 1144; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353.

(4) 9 Ind. Cas. 657; 38 C. 493; 15 C. W. N. 807.

not approved of by the Full Bench in respect of some of the observations made by the learned Judge; but the rule of succession of degraded Hindu women leaving illegitimate children as laid down there has not been dissented from. In that case a Hindu prostitute died leaving six children two of whom were sons and four daughters. It was held that each son would take 1/6th of the property left by the deceased. This being the state of the case-law, it may now be taken to be fairly settled that succession to *stridhan* property of a degraded Hindu woman is to be governed by the ordinary Hindu Law of inheritance and that daughter is not to be preferred to the son in the line of succession. According to the Hindu Law of succession to the *stridhan* property of a woman the son succeeds in preference to the married daughter under the Dayabhaga School of Hindu Law. The daughter Haripriya having been married before the death of Saraswati, Rampado, her son, succeeded to the entire property left by her. The second contention of the defendants fails accordingly.

The third point urged is that on the findings of the learned Judge Rampado was a minor at the time when he executed the *kobala* in favour of the plaintiffs on the 16th October 1920 and, therefore, the plaintiffs derived no title under it. The learned Judge remarked that in 1915, the date of the deed of gift by Kirtibash in favour of Saraswati, Rampado was 12 years of age and Haripriya was 11 years old. This point even was not raised in any of the Courts below nor even before the learned Judge. It is well-known that in this country in giving the age of a person the number of years he has completed is mentioned without taking into account the months by which he may have exceeded that age; so that a person nearing the age of 13 is said to be 12 years old though actually he may be very near 13. As this point was not raised and as it is a question of evidence, we do not think that we should be justified in holding that merely because he was said to be 12 years of age in 1915 he was below 18 on the 16th October 1920.

Fourthly and lastly it is urged that there is no finding in the Judge's judgment that the plaintiffs' *kobala* is genuine. There is doubtless no distinct finding on this point in the Judge's judgment but it may be due to the fact that its genuineness was not disputed before him by the defendants for the reason that the defendant himself was one of the attesting witnesses to that *kobala*. On a perusal of the Judge's judgment it seems to have been conceded that the plaintiffs' *kobala* was genuine as the learned Judge's finding with regard to certain rent-receipts filed by the defendant is based upon the fact that the defendant himself signed the *kobala* as an attesting witness. There is enough indication in his judgment to show that he believed the plaintiff's *kobala* to be genuine.

All the points raised by the appellants fail and this appeal must be dismissed with costs.

Duval, J.—I agree.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 143 OF 1924

March 6, 1925.

Present:—Mr. Hallifax, A. J. C.

GOKULDAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GULABRAO—DEFENDANT NO. 2—RESPONDENT.

Evidence Act (I of 1872), s. 115—Contract Act (IX of 1872), ss. 11, 65—Estoppel, whether operative against minor—Contract by minor, subsequently discovered to be void—Mistake of fact—Benefit, whether must be restored.

Persons mentioned in s. 11 of the Contract Act as incompetent to contract are not included in the "persons" of whom s. 115 of the Evidence Act speaks. There can, therefore, be no estoppel in respect of promises made by a minor as the promise of an infant is no more than that of a lunatic, that is, no promise at all. [p. 144, col. 1.]

Section 65 of the Contract Act applies to a case where the parties to a contract were not aware of the minority of one of them, and which was discovered to be void on that account at a subsequent date only. [p. 144, col. 2.]

Appeal against a decree of the District Judge, Wardha, dated the 18th January 1924, in Civil Appeal No. 99 of 1923.

Mr. *D. P. Tiwari*, for the Appellants.

Mr. *G. S. Lule*, for the Respondent.

JUDGMENT.—Gulab Rao the respondent to this appeal was born on the 9th

of May 1902 and was, therefore, a minor till the 9th of May 1920. His father, Ramchandra, died on the 23rd of May 1918, and on the 28th of June of the same year, being then just over sixteen, he applied on his own behalf and as guardian of his two younger brothers for mutation of names in respect of the family property and also for the appointment of himself as *lambardar*. Mutation was carried out and he was appointed *lambardar*. In many other matters also he acted as of full age from immediately after his father's death, including the execution on the 24th of June 1919 of a registered mortgage in favour of the plaintiffs in the present suit in which he was described as twenty years of age.

The present suit was filed, on the 11th of October 1922, against Gulab Rao and his uncle Atmaram on the basis of a bond signed by both of them on the 7th of August 1919, promising payment by the 28th of November 1919 and of certain advances made to them both on the 13th and 31st of October and the 15th of January 1920, of which they acknowledged receipt by signing the entries in the plaintiffs' account books. A decree has been passed against Atmaram, but it has been held in both the Courts below that neither s. 115 of the Evidence Act nor s. 65 of the Contract Act can operate to make Gulab Rao liable. It is against this decision that the plaintiffs have come here in appeal, apparently for the reason that Atmaram, who is separate from his nephew, does not own enough property to satisfy the decree.

That those persons mentioned in s. 11 of the Contract Act as incompetent to contract are not included in the "persons" of whom s. 115 of the Evidence Act speaks is put beyond controversy by the judgment of the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1) which was followed in *Muliabai* v. *Garu* (2). Estoppel can well be regarded as holding a person to the promises he did make for consideration and was capable of making, whether he was in a position to fulfil them at that time or not, but that clearly cannot be done in the case of a person incapable of making a promise at all; the promise of an infant is no more than that of a lunatic, that is, no promise at all.

(1) 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 43 I. A. 256; 115 L. T. 564; 32 T. L. R. 678 (P. C.).

(2) 53 Ind. Cas. 65; 15 N. L. R. 149.

The view that s. 65 of the Contract Act cannot be called in aid by the plaintiffs is based on an incidental passage in the judgment of the Privy Council in *Mohori Bibi* v. *Dharmodas Ghose* (3) which is as follows: "A new point was raised here by the appellants' Counsel founded on s. 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like s. 64, starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was, and never could have been, any contract."

In that case both parties to the agreement that was in fact made were aware of the minority of one of them, so that the agreement could not be said to have been "discovered to be void"; it was known to be void when it was made. In the present case probably both parties, and certainly the plaintiffs at least, were under a mistake of fact as to Gulab Rao's minority, which was not discovered till after the institution of the present suit. To such a case s. 65 of the Contract Act, undoubtedly, applies. The opening words of that section can refer to nothing but an agreement that was void when it was made. It may be remarked that though the learned Judges of the lower Courts have considered this matter with great care they have both fallen into the error of using the expression "void contract." If we use the terms of Indian law with any precision, the two words are directly contradictory, as will be seen by reference to cls. (*e*), (*g*), (*h*) and (*j*) of s. 2, and to s. 10 of the Contract Act.

The decrees of the Courts below will be modified by the addition of the name of Gulab Rao to that of Atmaram as liable jointly with him and also severally for the plaintiffs' claim and for their costs in the First Court. Gulab Reo will pay all the costs in both Appellate Courts.

G. R. D. *Decree modified.*

Z. K.

(3) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 65 OF 1925.

May 26, 1925.

Present :—Mr. Gokaran Nath Misra, A. J. C.

BAHADUR DUBE—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), s. 60 (a)—Possession of excisable article—House occupied by several persons, effect of.

A quantity of *bhang* was found in an earthen pot in the house occupied by the accused. Several adult persons lived in the house along with the accused :

Held, that the possession of the *bhang* could not, under the circumstances, be brought home to the accused and he could not be convicted of an offence under s. 60 (*a*) of the U. P. Excise Act.

In re Muhammad Ali Shet, 4 Ind. Cas. 163; 19 M. L. J. 301; 9 Cr. L. J. 52, *Bashir Ahmad Khan* v. *Emperor*, 54 Ind. Cas. 248; 22 O. C. 256; 21 Cr. L. J. 40; 2 U. P. L. R. (J. C.) 12, and *Emperor* v. *Farrukh Husain*, 67 Ind. Cas. 588; 24 O. C. 294; 23 Cr. L. J. 428, relied on.

Application against an order of the Sessions Judge, Gonda, dated the 23rd January 1925, confirming that of the Magistrate, First Class, Gonda, dated the 14th October 1924.

Mr. *S. N. Ray*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision of the order of the learned Sessions Judge of Gonda, dated the 23rd January 1925, confirming the order of Babu Chintamani, a Magistrate of the First Class of Gonda, convicting the applicant of an offence under s. 60 (*a*) of U. P. Excise Act, 1910. The accused has been sentenced to pay a fine of Rs. 15 or in default to suffer a week's rigorous imprisonment. The charge laid against him is that while a search was made in his house *bhang* weighing about 9 *chhataks* was found in a *handi* (earthen pot) in his house.

There can be no doubt that the *bhang* was discovered in the house of the applicant and if its possession could be brought home to him his conviction would be quite proper. In revision, however, it is urged that it was established beyond doubt that, in the house in which the *bhang* was found and in which the applicant lived, there were several other persons who also lived there. There were three of his sons, one of them aged about 25, the second aged about 20 and the third aged about 15, who together with his nephew, Bhikhari, aged about 25, all lived in the same house. Two witnesses, D. W. No. 1 and D. W. No. 2, were examined on the point and their evidence stands quite unrebutted. Both of them were not even cross-examined on this point. Under these circumstances it is impossible to bring home the possession of the *bhang* to the applicant. A ruling reported as *In re Muhammad Ali Shet* (1) was quoted before the learned Sessions Judge but he refused to look to it, it being an unauthorised publication. The principle laid down in that ruling, however, is a clear one and has been laid down by this Court in *Bashir Ahmad Khan* v. *Emperor* (2) and *Emperor* v. *Farrukh Husain* (3). In the former case, it was held by Kanhaiya Lal, J. C., that where stolen property was found in a house occupied by several persons, it was not enough to show that the property was found in the house, to convict a member of the family who might have had nothing to do with bringing or keeping it there. In the latter case the same principle was upheld by Lindsay, J. C. A father and son lived in the same house. The son was *challaned* under s. 411 of the Indian Penal Code after the father had been convicted under the same section. The only evidence against the son was that stolen property had been found in the house. It was held that there was nothing to show that the accused was in possession of the property which he knew or had reason to believe was stolen. In the case before me there is no evidence to show that the applicant brought the *bhang* and kept it in the *handi* which was found in the house. It might be that the other inmates of the house were responsible for this act. Under these circumstances the applicant cannot be convicted of the offence with which he has been charged. The learned Sessions Judge remarks in his judgment that the applicant was present in his Court and had red eyes of an habitual smoker of *bhang*. I am surprised to find such a statement in the judgment of the learned Judge. The redness in the eyes of the applicant, if any, as noticed by the learned Judge, may have been due to several causes and in the absence of evidence I am not prepared to hold that the applicant, merely on that account, is an habitual smoker of *bhang*.

I, therefore, accept this application, set

(1) 4 Ind. Cas. 163; 19 M. L. J. 301; 9 Cr. L. J. 52.
(2) 54 Ind. Cas. 248; 22 O. C. 256; 21 Cr. L. J. 40; 2 U. P. L. R. (J. C.) 12.
(3) 67 Ind. Cas. 588; 24 O. C. 294 23 Cr. L. J. 428.

aside the conviction and sentence passed on the applicant and direct that the fine, if realised, be at once refunded to him.

Z. K. *Application accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 322 OF 1925.

May 30, 1925.

Present:—Mr. Justice Sulaiman.

DARBARI LAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Whipping Act (IV of 1909), s. 3 (d)—Penal Code (Act XLV of 1860), ss. 354, 454—Criminal Procedure Code (Act V of 1898), s. 435—House-breaking in order to outrage modesty of woman—Whipping, sentence of, legality of—Reference to High Court—Appeal decided by District Magistrate—Sessions Judge, power of, to make reference.

A District Magistrate exercising original or appellate jurisdiction is inferior to the Sessions Judge, within the meaning of s. 435 of the Cr. P. C., and the latter has, therefore, jurisdiction to call for the record of a case decided by the District Magistrate on appeal and make a reference to the High Court. [p. 146, col. 2.]

Section 3 (*d*) of the Whipping Act does not make every house-trespass or house-breaking punishable with whipping, but only when the commission of the offence is "in order to the committing of any offence punishable with whipping" under that section. [p. 147, col. 1.]

The offence of outraging a woman's modesty under s. 354 of the Penal Code is not punishable with whipping under s. 3 (*d*) of the Whipping Act and consequently the offence of house-breaking in order to outrage the modesty of a woman is not so punishable. [*ibid.*]

Criminal Reference made by the Sessions Judge, Farrukhabad, dated the 20th of May 1925

REFERRING ORDER.—This is an application in revision against an order of the District Magistrate who, sitting as a Court of Appeal, has altered the conviction of the applicant from s. 451 to s. 454 of the Penal Code, and has converted his sentence from three months imprisonment and Rs. 50 fine to a sentence of whipping. It is contended on behalf of the applicant that this sentence is illegal, and the contention appears to me to be good. The Magistrate who tried the case charged the applicant with having committed an act of house trespass with a view to outrage the modesty of *Musammat* Rampa. The District Magistrate has apparently concurred with the finding of the Trial Court that the applicant's object was to outrage *Musammat* Rampa's modesty. There is, therefore, a common finding of both Courts that the applicant entered the house in order to commit an offence punishable under s. 354 of the Penal Code. This offence is not punishable with whipping and, therefore, s. 3 (*d*) of the Whipping Act does not apply. This being so, the sentence of whipping inflicted by the District Magistrate appears to be illegal, and I direct that the proceedings be referred to the High Court with a recommendation that the sentence of whipping be set aside and that either the original sentence be restored or such other sentence be inflicted as the Hon'ble Court may think proper.

Another point arises and has been argued before me and that is that the District Magistrate's order amounts to an enhancement of sentence. In a Madras case in 1897, *In re Appu* (1), it was held that where the lower Court reduced a sentence of imprisonment and inflicted a sentence of whipping, the effect was an enhancement. The present case is of course different inasmuch as the original sentences of imprisonment and fine have been set aside altogether and in their place a sentence of whipping has been substituted. In the circumstances therefore, I do not think it can be said the sentence has been enhanced, but I should be glad to have a ruling on this point.

Before the record is submitted to the High Court an opportunity will be given to the learned District Magistrate to state his point of view in regard to the two questions raised in this revision.

JUDGMENT.—This Reference must be accepted. The explanation added to s. 435 of the Cr. P. C. by Act XVIII of 1923 makes a District Magistrate exercising original or appellate jurisdistion inferior to the Sessions Judge. The latter has, therefore, jurisdiction to call for the record and make a reference to the High Court.

Both the Trying Magistrate and the District Magistrate found the accused guilty of entering a house in order to outrage the modesty of a woman. The First Court convicted him under s. 451 of the Indian Penal Code and sentenced him to undergo a sentence of three months' rigorous imprison ment and to pay a fine of Rs. 50, and in default one month more of rigorous

(1) 2 Weir 487.

imprisonment. The Appellate Court took the view that as the accused had used violence in effecting his escape he was guilty of house breaking as defined in s. 445 (5) of the Indian Penal Code, and, therefore, altered the conviction from one under s. 451 to one under s. 454 of the Indian Penal Code, and also altered the sentence to 15 stripes under the Whipping Act, s. 3 (*d*).

Leaving aside the question whether the alteration of a sentence of imprisonment and fine to one of whipping amounts to an enhancement of the sentence, I think the sentence of whipping was illegal.

Section 3 (*d*) of Act IV of 1909 does not make every house-trespass or house-breaking punishable with whipping, but only when the commission of the offence is "in order to committing of any offence punishable with whipping under *this* section." It is obvious that the offence of outraging a woman's modesty (s. 354 of the Indian Penal Code) is not punishable with whipping at all, and, therefore, house-breaking in order to commit that offence cannot be punishable.

The facts of the case just fell short of an attempt to commit rape otherwise the accused if convicted of the attempt could have been sentenced to whipping under s. 4. But even if it be assumed that the house-breaking was with the object of attempting to commit rape, s. 3 would be inapplicable as such offence is not punishable under that section.

The sentence of whipping being illegal, I set it aside and restore the sentence passed by the Trying Magistrate.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 69 OF 1925.

May 28, 1925.

Present:—Pandit Gokaran Nath Misra, A. J. C.

KEWAL KISHORE—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 117 (4), 439—Security proceedings—Evidence of general repute, what is—Defence evidence, consideration of—Revision—High Court, duty of.

A High Court is not a Court of Appeal in cases under s. 110, Cr. P. C., and its duty is not to weigh the evidence given on behalf of one side or the other but only to see whether the Court below has approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused. [p. 148, col. 1.]

Miharban Singh v. *Emperor*, 31 Ind. Cas. 821; 13 A. L. J. 1045; 13 Cr. L. J. 805 and *Gur Din* v. *Emperor*, 63 Ind. Cas. 407; 24 O. C. 225; 22 Cr. L. J. 647, referred to.

The accused is not entitled to an acquittal in such cases because the defence witnesses are as numerous as or more numerous than the prosecution witnesses. It is the weight of the evidence and not the number of the witnesses which the Court has to consider. [p. 148, col. 2.]

Gur Din v. *Emperor*, 63 Ind. Cas. 407; 24 O. C. 225; 22 Cr. L. J. 647, referred to.

Evidence of general repute, within the meaning of cl. (4) of s. 117, Cr. P. C., means, with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood in which he lives. Evidence as to his general disposition, founded on the opinion of a particular witness, such opinion being the result of the witness' personal experience and observation, will also be evidence as to his character. Although that evidence to be "evidence of general repute" must be evidence as to the general opinion of the neighbourhood in which the man lives, the evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally, and it need not show that such general opinion has been publicly expressed by the neighbours. [*ibid.*]

Dunia Singh v. *King-Emperor*, 5 O. C. 203, *Gokul* v. *King-Emperor*, 10 O. C. 132; 6 Cr. L. J. 97 and *Raghuber Dial* v. *King-Emperor*, 10 O. C. 168; 6 Cr. L. J. 256, referred to.

The admissibility of a witness' answer as to the general repute of the accused depends upon the substance of it, not upon its form. The real test is whether the answer shows what is the *general reputation* of the man in question, and the opinion given by the witness need not be the opinion of the entire community but it must at least give the opinion of a considerable number of persons and not be merely a repitition of what one or two persons have said to the witness. [p. 149, col. 1.]

Gokul v. *King-Emperor*, 10 O. C. 132; 6 Cr. L. J. 97, referred to.

A Court is not justified in rejecting the defence evidence in a case under s. 110, Cr. P. C., merely on the ground that the defence witnesses are the caste-fellows of the accused or that they have come forward at the trial voluntarily without being summoned. [p. 150, col. 1.]

Emperor v. *Rahu*, 59 Ind. Cas. 547; 43 A. 186; 18 A. L. J. 1114; 22 Cr. L. J. 115, *Rameshar Tewari* v. *Emperor*, 53 Ind. Cas. 156; 22 O. C. 375; 20 Cr. L. J. 748 and *Emperor* v. *Angnu Singh*, 71 Ind. Cas. 865; 45 A. 109; 20 A. L. J. 881; (1923) A. I. R. (A.) 354; 24 Cr. L. J. 257, referred to.

Application against an order of the First Additional Sessions Judge, Lucknow at Bara Banki, dated the 6th March 1925, upholding that of the Magistrate, First Class, Bara Banki, dated the 2nd February 1925.

Mr. *M. A. Khan*, for the Applicant.

The Government Pleader, for the Crown,

JUDGMENT.—This is an application for revision of the order of Babu Shankar Dayal, First Additional Sessions Judge of Bara Banki dated the 16th March 1925 upholding the order of M. Azimuddin Khan a Magistrate of the First Class of Bara Banki, dated the 2nd February 1925. Both the Courts below have held that the applicant is a fit person to be called upon to furnish security to be of good behaviour for a period of one year under s. 110 of the Cr. P. C.

The case for the prosecution is that the applicant is a man of bad character that he associates with such men as were registered members of criminal tribes and ex-convicts and that he is so desperate and dangerous as to render his being at large without security hazardous to the community. His defence was that he bore good character and that the case had been brought against him by the Sub-Inspector at the instigation of the *taluqdars* of Surajpur and Daryabad District Bara Banki who were inimically disposed towards him and who had induced the Police to start the case against him. Both the Courts below have found the prosecution case to be established and have not believed the defence witnesses. In revision it is contended before me that they have arrived at a wrong conclusion.

The case was very badly argued before me by Mr. M. A. Khan who appeared on behalf of the applicant and I had to spend a good deal of my time to go through the record and to find out as to whether the decision of the lower Courts was a correct one. He argued as if I was sitting as a Court of Appeal against the decision of the learned Additional Sessions Judge. This I refused to submit to. In *Miharban Singh* v. *Emperor* (1) Richards, C. J., laid down the principle which was to be followed by a High Court in deciding such cases. He held that the High Court was not a Court of Appeal in cases under s. 110 of the Cr. P. C. and the duty of the High Court was not to weigh the evidence given on behalf of one side or the other, but only to see whether the Court below had approached the consideration of the case in a fair way having regard to the interest not only of the prosecution but also of the accused. The same principle was laid by Daniels, J. C., in this Court in *Gur Din* v. *King-Emperor* (2). The above-mentioned ruling of the Allahabad High Court was quoted with approval and it was further laid down that the accused was not entitled to an acquittal in such cases because the defence witnesses were as numerous as or more numerous than the prosecution witnesses and that it was the weight of the evidence and not the number of the witnesses which the Court had to consider. In dealing with the present case I would approach it according to the view laid down in the above-mentioned cases.

The prosecution evidence has been discussed in great detail and with extreme care by the learned Sessions Judge and the learned Counsel only vaguely pointed out to me that much of that evidence was inadmissible. He did not refer to those portions of the evidence for the prosecution which, in his opinion, were inadmissible. He merely urged in a general way that the evidence as to "general repute" as given on behalf of the prosecution was indamissible. The rule of law to be followed in such cases was laid down so far back as in the case of *Dunia Singh* v. *King-Emperor* (3). Spankie, A. J. C., has discussed the question of the evidence of general repute at pages 209* and 210* of the said report. "Evidence of general repute" observes the learned Judge "means, with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood in which he lives. Evidence as to his gereral disposition, founded on the opinion of the particular witness, such opinion being the result of the witness' personal experience and observation, will also be evidence as to his character. But although...that evidence to be evidence of general repute" must be evidence as to the general opinion of the neighbourhood in which the man lives, the evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally, and it need not show that such general opinion has been publicly expressed by his neighbours....If a witness is asked what the man's character is, and he were to say that in the general opinion of the man's neighbours the man is an habitual thief that statement is 'evidence of general repute' and that if he were to say that he did not know

(1) 31 Ind. Cas. 821; 13 A. L. J. 1046; 13 Cr. L. J. 805.

(2) 63 Ind. Cas. 407; 24 O. C. 225; 22 Cr. L. J. 647.

(3) 5 O. C. 203.

*Pages of 5 O. C.—[*Ed.*]

what the neighbours in general thought of the man, but his own opinion was that the man was an habituael thief, that also would be admissible as evidence of the man's character". Chamier, A. J. C., laid down in *Gokul* v. *King-Emperor* (4) that when a witness was examined about the reputation of a person and was asked whether he knew the general reputation of that person among his neighbours and what that reputation was, a witness' answer was not necessarily inadmissible because he stated what was generally said of the person in question. "When a man said" observed the learned Judge "that a certain person had a bad reputation he probably meant that he had heard many people speak ill of him and to admit evidence of what was *generally said* of a person in a case under s. 110 did not seem to be contrary to the Evidence Act. The estimation in which a man was held by his neighbours is known as a rule by what they said of him. Evidence of what is *generally said* of a man by his neighbours is, therefore, direct evidence of the fact in issue." The learned Judge further observed that the admissibility of a witness' answer depended upon the substance of it, not upon its form. The real test was whether the answer showed what was the *general reputation* of the man in question and the opinion given by the witness need not be the opinion of the entire community but it must at least give the opinion of a considerable number of persons and not be merely a repetition what one or two persons have said to the witness. In *Raghuber Dial* v. *King-Emperor* (5) the same learned Judge approved of the principle laid down by Spankie, A. J. C., in *Dunia Singh* v. *King-Emperor* (3).

I have gone through the whole of the prosecution evidence in order to find out for myself as to whether the rule of law laid down by this Court in the above cases has been observed by the prosecution in tendering its evidence in this case and after examining the entire prosecution evidence I am satisfied that the said rule of law has been fully observed. Ram Din Singh (P. W. No. 2), Thakur by caste and *zemindar* and *mukhia* of Ktihori, said that the village Kutti, a *purwa* of Hatonda, where the accused resided was at a distance of one *kos* from his place and that the character of the accused was not good. He based this opinion upon his own observations to the effect that he saw the accused associating with men of bad character who had committed thefts. He gave specific instances of such acts of association. Ramjiwan (P. W. No. 3), a respectable tenant of village Hatonda, in a *purwa* of which the accused lived, deposed that the accused was a man of bad character and that people called him a thief, the said opinion being the opinion of the residents of Hatonda, Kutwa, Sanakapur and Bhawnipur. Dhanraj (P. W. No. 4), a cultivator of the same village Hatonda, deposed that the people of Sujwapur, Rajpur and Hatonda gave the accused the reputation of a thief. He also gave instances where he had found the accused associating with thiefs and ex-convicts and of thefts having been reported to have occurred shortly after he had noticed the accused gathered with other men of bad character. Ram Naryan (P. W. No. 6), a respectable tenant of Lallupur, deposed that he knew that the accused was a thief and of bad character and the reason for his saying so was that he found him associating with thieves gathered at various places. He said that it was since one year and a half that the accused had become notorious as a bad character. Chandi (P. W. No. 7) of Sobhapur, a village close by, stated that the accused was by habit a thief, that there was a burglary committed at his place about one and a half years ago and that he had suspected the accused as having taken part in it. He also said that the men of his village usually called him a thief. Auseri Kurmi (P. W. No. 8), of the village Lal Ganj, said that the accused was a thief and a *badmash* and he knew it because hundreds of people called him as such. It is not necessary for me to summarize in detail the whole of the prosecution evidence because that has been very well done by the learned Judge in his elaborate judgment. It is enough for me to point out that the prosecution evidence fully satisfies the test of law laid down by this Court in the above-mentioned cases. It, therefore, appears to me that the prosecution evidence is good and admissible and there is no error of law committed by the Courts below in holding the accused to be a man of bad character on any inadmissible evidence.

It was then pointed out to me that the defence evidence had been practically

(4) 10 O. C. 132; 6 Cr. L. J. 97.
(5) 10 O. C. 168; 6 Cr. L. J. 256.

ignored by both the Courts, as they had rejected it on grounds which were inadequate in law and that the learned Judge had rejected the defence evidence on the ground that it consisted of the statements of a number of witnesses, most of whom were men of the caste of the applicant and all of whom were unsummoned witnesses. In *Emperor* v. *Rahu* (6) Piggot, J., disapproved the rejection of the defence evidence on the ground that they were the caste-fellows of the accused or that they had come forward at the trial voluntarily without being summoned. The same principle was laid down by Kanhaiya Lal, J. C., in this Court in *Rameshar Tewari* v. *King-Emperor* (7). The principle has been quoted with approval in a later decision of the Allahabad High Court by Walsh, J., in *Emperor* v. *Angnu Singh* (8). I am, therefore, of opinion that the learned Additional Sessions Judge as well as the Magistrate was not justified in rejecting the evidence on behalf of the defence on this ground. There are only two courses open to me to take, either to remand the case to the learned Additional Sessions Judge and to ask him to consider again the evidence whether it was one which he could reject on grounds other than those stated by him or to go through the evidence myself and to form my own opinion about it. The learned Judge also states in his judgment that he had read the evidence through and that he was not impressed by its reliability. Under those circumstances I decided to take the latter course and to go through the evidence myself. I have done so and I must say that after reading it I have also not been impressed as the learned Judge was not. If I had found that the prosecution was defective or rested on inadmissible evidence I might have been inclined to take a different view of the defence evidence. Having, however, accepted the prosecution evidence as good and reliable I have not been able to reject it merely on the ground that a large number of witnesses had been produced on behalf of the defence. Mahabir, the father of the accused, who went into the witness-box on behalf of the defence, stated that the case had been started at the instance of the Surajpur estate since he had had litigation with the *Taluqdar* of Surajpur and with the *Taluqdar* of Daryabad. I have not been able to discover any satisfactory evidence of this fact on the record. It is impossible to accept this theory because a large number of witnesses on behalf of the defence came both from Surajpur estate and Daryabad estate. If this case had been started at the instigation of these two estates it would not have been possible for the accused to produce so many witnesses coming from those estates in his defence. I must, therefore, unhesitatingly reject that contention. If there is no explanation as to why such a large number of prosecution witnesses coming from different villages in the neighbourhood should come forward and state in open Court about the reputation of the accused, the defence evidence must be rejected as unworthy of credit and as extremely unreliable.

I have, therefore, on consideration of the entire evidence on the record come to the conclusion that the applicant was rightly held by the Courts below as a fit person to be called upon to furnish security to be of good behaviour. I accordingly uphold that order and dismiss this application.

Z. K. *Application dismissed.*

(6) 59 Ind. Cas. 547; 43 A. 186; 18 A. L. J. 1114; 22 Cr. L. J. 115.
(7) 53 Ind. Cas. 156; 22 O. C. 375; 20 Cr. L. J. 748.
8) 71 Ind. Cas. 865; 45 A. 109; 20 A. L. J. 881; (1923) A. I. R. (A.) 354; 24 Cr. L. J. 257.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 324 OF 1925.

May 13, 1925.

Present :—Mr. Simpson, A. J. C.

ABHRAM BALI—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 497—Bail, when to be refused—Non-bailable offence—Practice.

Under the Cr.P.C., as amended in 1923, it is no longer the case that bail ought to be refused merely because an offence is non-bailable. That rule is now restricted to offences punishable with death or transportation for life. In other cases bail may be granted unless there are reasons why the accused should not be admitted to bail.

Application against an order of the First Additional Sessions Judge, Lucknow at Bara Banki, dated the 27th April 1925.

Mr *S. N. Sinha*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application

for revision of the order of the Sessions Judge refusing bail. The charge is under ss. 466 and 167, Indian Penal Code. Two persons have been committed to Sessions, namely, the applicant, Abhram Bali and Zafar Husain. The application set forth that the applicant is about 70 years old and a Government servant. He is in fact a *patwari*. It is further stated that during the trial in the Magistrate's Court he was released on his personal recognizance of Rs. 50 only. The third point, to which I attach considerable importance, is that if he is not allowed out on bail there will be nobody to instruct his Counsel in going through the mass of documentary evidence, and he will not be able to make a proper defence. The fourth point is that the learned Judge has released Zafar Husain. In the order which is objected to no reasons are given. The learned Sessions Judge says "I see no reason to admit the application." But as the law stands now it is no longer the case that bail ought to be refused merely because an offence is non-bailable. That rule is now restricted to offences punishable by death or transportation for life. Looking at it the other way there appears to be no reason why the accused should not be admitted to bail. The learned Government Pleader has instructions to oppose the application but he can give me no ground except that the offence is a serious one. I allow the application and direct that the applicant be admitted to bail to the satisfaction of the learned Sessions Judge.

Z. K. *Application accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 153 OF 1925.

May 14, 1925.

Present:—Mr. Justice Macpherson.

NANDAN SINGH AND ANOTHER—PETITIONERS

versus

SIARAM SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute relating to land—Minor interested in land, whether essential party—Notice issued to minor, non-service of, effect of—Order, validity of, as against other parties—Prejudice.

A question of misjoinder or non-joinder of parties does not ordinarily affect jurisdiction. Whether a party has been wrongly included or excluded is a question of procedure by which jurisdiction is not affected. [p. 152, col. 1.]

Krishna Kamini v. *Abdul Jubbar*, 30 C. 156; 6 C. W. N. 737 (F. B.), relied on.

Where proceedings are taken under s. 145 of the Cr. P. C., a minor who is interested in the property in dispute, although a proper party to the proceedings, is not an essential party inasmuch as he would not be a likely person to cause a breach of the peace. Where service of notice is not properly effected upon the minor in such a case, an order passed in the proceedings, although it might be open to objection on behalf of the minor, cannot be said to have been made without jurisdiction so far as the other parties to the proceeding are concerned, if no prejudice has resulted to them owing to the absence of service of notice on the minor. [*ibid.*]

Criminal revision from an order of the Sessions Judge, Muzaffarpur, dated the 2nd March 1925, affirming that of the Sub-Divisional Officer, Muzaffarpur, dated the 30th January 1925.

Mr. *P. C. Rai*, for the Petitioners.

Mr. *B. P. Jamuar*, for the Opposite Party.

JUDGMENT.—This Rule has been issued to consider the question whether the Sub-Divisional Magistrate of Muzaffarpur acted without jurisdiction in a proceeding under s. 145 of the Cr. P. C. in which he decided against the second party of which the petitioners Nandan Singh and Hirdey Singh were members.

The facts are as follows:—

In a Collectorate partition the division was under order of the Board of Revenue made upon the basis of the entries in the Record of Rights, (which show as *bakasht malik* certain lands claimed by various co-sharers as their *raiyati* lands) "without prejudice to the question whether the proprietors concerned have a *raiyati* status or not and without prejudice when possession is given upon completion of the partition to the rights of any parties in cultivating occupation." Delivery of possession of *takhtas* was given in 1922 and each set of co-sharer landlords took over the lands within their own new *takhta* which were shown as *bakasht malik* in the Record of Rights. The joint family of the present petitioners consisting of Nandan Singh and Hirdey Singh adults, and Ramlochan Singh minor took possession of *bakasht* lands previously held by the opposite party and the opposite (first) party took possession of *bakasht* lands previously held by the petitioners. Thereafter the petitioners sold their *takhta* and having no land left endeavoured to retake possession of the lands formerly in their cultivation which had fallen in the *takhta* of the opposite party

and had been taken possession of by them.

That the Magistrate rightly held that the opposite party was in possession of the lands in dispute is incontrovertible. It is urged, however, that his proceedings were without jurisdiction in the following circumstances. He made party to the order which he drew up under sub-s. (1) not only the petitioners, but their minor brother Ramlochan. The process server, however, returned the notice issued on Ramlochan under sub-s. (3) with the report "Ramlochan Singh is a minor. Therefore, I have returned the notice issued in his name in which he is not described as a minor." No further steps were taken to serve notice upon the minor and in the written statement which the petitioners filed they took objection that the proceeding so far as it concerned Ramlochan, was illegal because he was not represented by a guardian and that as a result the whole proceeding was without jurisdiction. The Magistrate took no action upon this objection and eventually made an order under sub-s. (6) against all three brothers.

Now this application is made by the two major brothers only and Ramlochan Singh is no party to it. It may well be that the proceeding having been taken without notice to him and in his absence is bad in law, so far as he is concerned, for the reason that the Magistrate had no jurisdiction to pass the order so far as it affected him. But that is not to say that for that reason the whole proceeding is without jurisdiction. The decision of the Full Bench in *Krishna Kamini* v. *Abdul Jubbar* (1) is authority for the view that the question of misjoinder and non-joinder of parties does not ordinarily affect jurisdiction. It is a question of procedure by which jurisdiction is not affected, whether a party has been wrongly included or excluded. The invalidity of the proceeding against one member of the petitioner's party does not necessarily invalidate the whole proceeding. The minor, though interested in the dispute and a proper party, was not in the circumstances an essential party, especially as he would not be a likely person to cause a breach of the peace. Thus the proceeding is not without jurisdiction in respect at least of the persons who were actually parties, and were not prejudiced, and it is palpable that petitioners were not prejudiced.

The Rule is, therefore, discharged.

Z. K. *Rule discharged.*

(1) 30 C 155; 6 C. W. N. 737 (F B.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 30 OF 1925.

March 5, 1925.

Present:—Mr. Dalal, A. J. C.

BALKARAN SINGH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 216—"Harbour," meaning of—Making sign of the approach of Police, whether offence.

The word "harbour" in s. 216 of the Penal Code includes every kind of assistance rendered to a person to evade apprehension. Making a sign to a person on the approach of the Police to escape would fall within the purview of s. 216.

Emperor v. *Husain Bakhsh*, 25 A. 261; A. W. N. (1903) 29, dissented from.

Muchi Mian v. *Emperor*, 40 Ind. Cas. 731; 21 C. W. N. 1062; 26 C. L. J. 141; 18 Cr. L. J. 731, relied on.

Application against an order of the Additional Sessions Judge, Gonda, dated the 10th November 1924.

Mr. *R. F. Bahadurji*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The facts must be accepted as have been by the two subordinate Courts as this is an application for revision. One Tirbhuwan was an offender whose arrest was desired by the Police. The Police traced him to a grove where he was sitting with his brother the applicant Balkaran Singh. As the Police arrived and shouted that Tirbhuwan was wanted Balkaran made a sign to Tirbhuwan to escape. On this ground Balkaran has been convicted of an offence under s. 216 of the Indian Penal Code. The offence is of a very slight character because the mere warning by the brother could not in any way have helped Tirbhuwan's escape. At the same time the conviction, in my opinion, is sound. The word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension. The last words are general and will include every kind of assistance. It was held by a Single Judge

of the Allahabad High Court in 1903, *Emperor* v. *Husain Bakhsh* (1), that the ways in which the assistance may be rendered must be restricted for the purpose of s. 216, Indian Penal Code, to methods which may probably be regarded of like nature with supplies of food, etc. The opinion was dissented from by a Bench of the Calcutta High Court in 1917, *Muchi Mian* v. *Emperor* (2). To me the opinion of the Calcutta High Court appears to be justified by the extremely general terms of the difinition of the word "harbour."

I uphold the conviction. Having regard to the extremely technical character of the offence, I think that a small fine instead of the heavy fine of Rs. 200 imposed by the Trial Court will be sufficient. I reduce the fine to one of Rs. 15 and direct the balance of fine, if any, recovered to be refunded. I am informed that the fine has been paid.

Fine reduced.

Z. K.

(1) 25 A. 261; A. W. N. (1903) 29.

(2) 40 Ind. Cas. 731; 21 C. W. N. 1062; 26 C. L. J. 141; 18 Cr. L, J. 731.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 46 OF 1925.

March 24, 1925.

Present:—Mr. Justice Adami.

RAMCHARAN SINGH AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, absence of, effect of—Illegality.

The provisions of s. 342 of the Cr.P.C. are mandatory. The accused must be examined under the provisions of that section after the prosecution has closed and before the accused has entered upon his defence and if the provisions of the section are not observed the trial is vitiated.

Criminal revision from an order of the Sessions Judge, Muzafferpur, dated the 4th of December 1924, refusing an application against the District Magistrate, Muzafferpur, dated the 21st of October 1924.

Mr. *S. M. Gupta*, for the Petitioners.

JUDGMENT.—The only point taken in this application is the fact that the provisions of s. 342 have not been complied with in the trial of the petitioners and, therefore, the trial and the convictions found against the petitioners are vitiated.

It appears that the petitioners were not examined under s. 342 until about two months had elapsed after the petitioners had entered upon their defence. The learned Sessions Judge holds that, as the defence could not be prejudiced in any way by the delay in examining the accused under s. 342, the trial could not be held to be vitiated. It may be that the delay did not in fact prejudice the petitioners; but as has been often held by this Court, the provisions of s. 342 are mandatory. The accused must be examined under s. 342 after the prosecution has closed and before the accused have entered upon their defence, and if the provisions of that section are not observed, the trial is vitiated. In the Calcutta High Court the case of *Surendra Lal Shaha* v. *Isamaddi* (1) was a case in which the circumstances were similar to those of the present case, and in that case it was found that the trial was vitiated.

The convictions of the petitioners must be set aside and it is directed that the trial of the petitioners must proceed now from the point where the prosecution closed their case. The petitioners must be examined as required by s. 342 of the Cr. P. C., and then be allowed to enter upon their defence. The fines, if paid, will be refunded.

Z. K.

Conviction set aside.

(1) 84 Ind. Cas. 325; 51 C. 933; 26 Cr. L. J. 261; (1925) A. I. R. (C.) 480.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 309 OF 1924.

March 21, 1925.

Present:—Mr. Findlay, O. J. C.

NARAYAN—APPLICANT

versus

CHANDRABHAGA AND ANOTHER—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 145—Order discharging party—Review, whether lies—Jurisdiction—Proceedings, nature of—Party in possession of part of property in dispute—Order, whether illegal—Party joined at late stage—Order based on evidence previously recorded, legality of.

A Magistrate has no jurisdiction to review an order passed under s. 145 of the Cr. P. C. discharging a party from the proceedings So far as the party discharged from the proceedings is concerned, the order is final. [p. 154, col. 2.]

Parbati Charan Roy v. *Sajjad Ahmad Chowdhury*, 35 C. 350; 12 C. W. N. 605; 7 Cr. L. J. 401, referred to.

It is the initial duty of a Magistrate under s. 145 of the Cr. P. C. to find out what parties are concerned in the dispute that has arisen, and he should also determine which parties are in actual possession. [p. 155, col. 1.]

Beni Singh v. *Umrao Mahto*, 5 C. W. N. 900, referred to.

Proceedings under s. 145, Cr. P. C., are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute. [p. 155, col. 1.]

Krishna Kamini v. *Abdul Jubbar*, 30 C. 155; 6 C. W. N. 737, referred to.

An order under s. 145, Cr. P. C., is illegal, if it is based upon evidence some of which was recorded behind the back of a person who was at the time not a party to the proceedings, but who is nevertheless sought to be bound by the order. [p. 154, col. 2.]

Application for revision of an order of the Sub-Divisional Magistrate, Ramtek, (Nagpur), dated the 21st August 1924, in Miscellaneous Case No. 16 of 1924.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *M. B. Kinkhede*, R. B., Non-Applicants.

ORDER.—The present application relates to proceedings under s. 145, Cr. P. C., in the Court of the Sub-Divisional Magistrate, Nagpur. The non-applicants in this Court were applicants in the lower Court and made their original application therein on the 11th of February 1924. On the 6th of March 1924 the Magistrate passed a preliminary order in the case. On the 11th of April 1924 the Magistrate held that the non-applicant Chandrabhaga held 13 *olis* out of the field and the non-applicant Bapu held 7 *olis*. He thereupon passed the following order:—

"Although Narain Balaji is said to have forcibly entered into possession of these 20 *olis* Bapu and Chandrabhaga cannot jointly file this application, each should file a separate application. This I have pointed out to Bapu and others. Case for 12th April 1924."

At subsequent hearings Bapu was accordingly dropped from the proceedings and these, for the time being, were concerned with Chandrabhaga alone. Meanwhile, as a result of the Magistrate's order Bapu filed a separate application on the 26th of April 1924. This application was dealt with separately up to the 17th of July 1924, on which date the Magistrate passed the following order:—

"I have read the written statement filed by the parties. I find that it was unnecessary to have told Bapu that he should file a separate application. Final order could legally be passed on the joint application presented by Chandrabhaga Bai and Bapu.....I amalgamate the proceedings of this case with the proceedings in the earlier Miscellaneous Case No. 16 of 1924."

Thereafter the proceedings were amalgamated and the Magistrate heard further evidence and finally passed the order, of which revision is now sought, on the 21st of August 1924.

It is hardly necessary to point out that the vacillating procedure of the Magistrate has rendered the order, of which revision is sought, wholly illegal. The Magistrate, having definitely dropped Bapu from the proceedings by his order of the 11th of April 1924, was not in a position, as he did practically, to cancel that order by a later one. I am not concerned with the question of whether the subsequent order of amalgamation passed on the 17th of July 1924 was indeed passed, as alleged by the applicant, because the Magistrate found that his procedure in the case had involved the non-applicants in a legal difficulty, *viz.*, that a preliminary order in Bapu's separate case was passed on the 2nd of May 1924, that is much more than two months after the date of dispossession. What is obvious is that particularly in the case of Bapu the order appealed against is wholly illegal, because it is avowedly based on much evidence which was recorded behind Bapu's back at a time when he was not a party to the proceedings at all.

So far as the order of 11th April 1924, dismissing the joint application, was concerned, it was not open to the Magistrate to review it, as he, in effect, did by a subsequent order of 17th July 1924. That order was a final order, so far as Bapu was concerned, and a Magistrate has no jurisdiction to review such an order under s. 145, Cr. P. C.: *cf. Parbati Charan Roy* v. *Sajjad Ahmad Chowdhry* (1). It follows therefrom that the subsequent admission of Bapu in the re-amalgamated proceedings was *pari passu* illegal If the amalgamation order of 17th July 1924 be considered as superseding the previous proceedings, then, strictly speaking, no preliminary order remained in existence, as regards Bapu at least, and any such preliminary order, had a fresh one been possible, would have been dated much more than two months after the alleged date of dispossession. From every point of view, therefore, the whole proceedings must

(1) 35 C. 350; 12 C. W. N. 605; 7 Cr. L. J 401

be illegal. The Magistrate having definitely held that Bapu himself must institute a separate proceeding, the amalgamation order of the 17th July 1924 was improper and *ultra vires*. Over and beyond this, the Magistrate proceeded to pass his final order on evidence of which had very largely been recorded at a time when Bapu was not a party to the proceeding.

It is, no doubt, open to the non-applicant to urge that as they have succeeded, they have not been prejudiced by the procedure followed by the Magistrate. But we have here a procedure adopted, which was, in my opinion, absolutely illegal and *ultra vires* and in those circumstances it is impossible to hold that the present applicant has been prejudiced by the highly puzzling and vacillating course followed by the Magistrate concerned. In this view of the case, therefore, I am constrained to hold that the proceedings of the lower Court were wholly invalid and must be set aside.

The result is that the application of Chandrabhaga and Bapu, dated the 11th February 1924, is dismissed. In any further such proceedings, as may come before the Magistrate in question, he would do well to remember that it is his initial duty in a proceeding under s. 145, Cr. P. C., to find out what parties are concerned in the dispute that has arisen and he should also determine which parties are in actual possession: *cf. Beni Singh* v. *Umrao Mahto* (2). Over and beyond this I may remark that the proceedings under s. 145, Cr. P. C., are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute: *cf. Krishna Kamini* v. *Abdul Jabbar* (3).

G. R. D. *Application dismissed.*

Z. K.

(2) 5 C. W. N. 900.

(3) 30 C. 155; 6 C. W. N. 737

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 96 OF 1925.

March 20, 1925.

Present:—Mr. Dalal, A. J. C.

BEHARI—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 233—Penal Code (Act XLV of 1860), s. 412—Receiving property obtained by dacoity—Joint trial of several accused, legality of—Identification of ornaments—Assessors, opinion of, value of.

A joint trial of persons accused of offences under s. 412 of the Penal Code is illegal. [p. 156, col. 1.]

Jagan Nath v. *Emperor*, 28 Ind. Cas. 158; 18 O. C. 92; 2 O. L. J. 94; 16 Cr. L. J. 270, followed.

In a case of identification of ornaments ordinarily worn by the people of the country the opinion of the Assessors is of considerable value as they are well-acquainted with the ways and habits of men of the standing of the complainant and the accused. [p. 155, col. 1]

Appeal against an order of the First Additional Sessions Judge at Bara Banki, dated the 2nd January 1925.

Mr. *R. F. Bahadurjee*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The learned Sessions Judge convicted Behari Brahman of an offence under s. 412, Indian Penal Code, in disagreement with all the Assessors. A dacoity was committed in the house of Phulli *Helwai* during the night preceding the 1st of August and on the 7th of August a pair of *bank* (armlets) was found in the appellant's house. The appellant lives about six miles from the scene of the dacoity. It is claimed that the *bank* belonged to the complainant and was stolen during the dacoity. If this could be proved the conviction would stand because the appellant claimed to be owner of the property and on proof of the ornament belonging to the complainant the defence will be found to be false and disclose a dishonest intention.

I am not satisfied that the property is proved to be that of Phulli. To start with in the first list of stolen property the weight of the armlet was given as 4 *tolas* and the price Rs. 3. The armlet which was recovered was really 8 *tolas* in weight worth about Rs. 5 or Rs. 6. Another thing is that *Mussammat* Ram Piari, the daughter-in-law of the complainant, who is stated as the person who were the ornament found the ornament too large in Court. Her explanation that she had lost weight recently is not referred to in the learned Sessions Judge's judgment and does not sound probable. The appellant is a Brahman and it cannot be said that he is making an extravagant claim when he says that the ornament belongs to a mistress of his. In a case of identification of this nature the opinion of the Assessors is of considerable value as they are well-acquainted with the ways and habits of men of the complainant's and appellant's standing.

I set aside the conviction and sentence and order the appellant to be released at once.

The attention of the learned Sessions Judge is drawn to the illegality of his trying Behari jointly with another person on a charge under s. 412, Indian Penal Code. The learned Government Pleader referred me to the provisions of s. 239 (*f*) of the Cr. P. C. The sections mentioned there are ss. 411 and 414 and when definite sections are mentioned I do not think that the provisions can be extended by analogy to a trial of persons accused of offences under s. 412. The principle of the ruling of this Court in *Jagan Nath* v. *Emperor* (1) will still apply in my opinion.

Z. K. *Conviction set aside.*

(1) 28 Ind. Cas. 158; 18 O. C. 92; 2 O. L. J. 94; 16 Cr. L. J. 270.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 192 OF 1924.

February 13, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

MAHOMED MAHDISHAH OF PIR JHANDO—APPLICANT

versus

WAHDALSHAH AND OTHERS—OPPONENTS.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under, requisites of—Errors and omissions relating to procedure, whether oust jurisdiction—Prejudice, proof of.

The only two essential conditions which not only confer jurisdiction on a Magistrate, but make it imperative for him to take the preventive proceedings contemplated by s. 145, Cr. P. C., are first, that there should be a dispute over land or water and secondly, that such dispute should be likely to cause a breach of the peace. [p. 157, col. 2.]

A Magistrate having been once seized of jurisdiction to institute proceedings under s. 145 of the Cr. P. C. cannot in the absence of proof or prejudice to a party be divested of it by errors and omissions which relate to procedure and not to jurisdiction. [p. 157, col. 2; p. 158, col. 1.]

Kamal Kutty v. *Udayavarma Raja Valia Raja of Chirakal*, 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; 23 M. L. J. 499; (1912) M. W. N. 1154; 13 Cr. L. J. 753, *Krishna Kamini* v. *Abdul Jabbar*, 30 C. 155; 6 C. W. N. 737 (F. B.) and *Sukh Lal Sheikh* v. *Tara Chand*, 33 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618 (F. B.), followed.

Application to revise an order of the Resident Magistrate, Tando Adam, dated the 25th October 1924.

Mr. *C. M. Lobo*, for the Applicant.

Mr. *P. K. Vaswani*, for the Opponents.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

ORDER.—This is a revision application against the order of the Resident Magistrate, Shahdadpur, restoring possession of certain disputed lands under s. 145, Cr. P. C., to one Pir Ahsanalishah or his agents. The applicant is the brother of Pir Ahsanalishah and the opponents are some of the followers of this Pir. Two of them hold a power-of-attorney from him. Pir Rashidullahshah the father of the two Pirs was the *gadinishin* of the shrine at the village of Jhando. He died on the 20th May 1922. From his first wife he had five sons, *viz.*, Pir Ziauddin Shah, the applicant Pir Mohamed Mahdishah, Pir Nurdin Shah and two others. From his second wife he had Pir Ahsanalishah. After his death there were disputes between Pir Ziauddin Shah and Pir Ahsanalishah as to the right to succeed to the *gadi* of this shrine and to the property left by the old Pir. Pir Ahsanalishah disputed the right of the eldest son to succeed to the *gadi* on the ground that he was born from a low caste woman and put forward his preferential claim on the ground that his mother belonged to the same Pir family. The disputes between the brothers became more acute in September 1922 and led to a fracas between the adherents of the two parties and loss of life. Police force was picketed in the village of Jhando to prevent a further breach of the peace which was withdrawn in October 1922 after the sons of the first wife had migrated from the village of Jhando to some place in the Larkana District. The dispute as to the *gadi* and lands which the old Pir died possessed of, are the subject of civil litigation. The lands which are the subject-matter of the present proceedings are claimed by the applicant on behalf of himself and his two full brothers by virtue of a gift from their father subsequently confirmed by a written document Ex. 2, and to have been in their possession and enjoyment for a number of years upto 12th November 1922, when the present proceedings were taken on the petition filed by the applicant stating that the opponents had on that day by show of criminal force prevented him from entering on his lands. The learned Magistrate has held that the applicant and his full brothers were in possession and enjoyment of the lands in

dispute in their own right as donees upto the time of their father's death. In dealing with the question of the alleged subsequent dispossession he has fallen into a two-fold error. He has assumed that the applicant and his full brothers were dispossessed on some date prior to 5th December 1922, (the date of the preliminary order passed under s. 145, Cr. P. C.), and as he was not prepared to hold that the applicant was prevented from entering on his lands on the 12th November 1922, he has assumed that this dispossession took place more than two months before the preliminary order.

The lands were in the physical possession of tenants who held them on behalf of the applicant and his full brothers. The distribution of the different blocks for cultivation among the tenants had taken place prior to May 1922, advances had been made to them by the applicant and the time when the applicant and his brothers had occasion to visit the fields again was in October or November for purposes of making *batai* and appropriating to themselves the share of the produce. The possession of the applicant and his brothers through the tenants would continue in them till such time as it can be shown that either the tenants were dispossessed or had disavowed the title of the applicant or attorned to Pir Ahsanalishah or had allowed him or his agents to make *batai* and appropriate the *zemindari* share of the produce.

The applicant had asserted that it was on the 12th of November that he was for the first time prevented from going to the fields. The learned Magistrate considered this story as a pure invention. He could not make up his mind to believe that the applicant who had a month before migrated from the village of Jhando through fear would make bold to run the risk of losing his life by visiting the fields. There is nothing so inherently improbable in this story to discard it as a pure invention. The withdrawal of the applicant from Jhando is consistent with a desire to avoid constant bickerings between the adherents of the two parties, and even if it be assumed that the applicant did not go to his fields on the 12th November, it does not follow that Pir Ahsanalishah had taken possession of the lands before the 12th November 1922. We think the finding of the learned Magistrate as to dispossession cannot be maintained, and the applicant must be resumed to have continued in possession of the disputed lands upto the date of his petition.

Mr. Vaswani, the learned Counsel for the opponents, has urged that the proceedings of the lower Court are without jurisdiction as (*a*) the preliminary order passed by the learned Sub-Divisional Magistrate does not specify the disputed lands or state the grounds of his being satisfied of the likelihood of a breach of the peace, (*b*) that the only party concerned in the dispute was Pir Ahsanalishah and had not been made a party to these proceedings, and (*c*) that no notice was published by being affixed at or near the subject-matter of the dispute so as to make it obligatory on him or any other party concerned to appear in the proceedings on pain of being bound by any adverse order passed against such absentee. He has further urged that the proceedings have been so irregular, that it would not be proper for us to interfere in revision so as to affect the rights of Pir Ahsanalishah who is not now before us.

We are not prepared to accede to the contention that the proceedings of the lower Court are without jurisdiction. The only two essential conditions which not only confer jurisdiction on the Magistrate, but make it imperative on him to take the preventive proceedings contemplated by s. 145, Cr. P. C., are, firstly, that there should be a dispute over land or water and, secondly, that such dispute is likely to cause a breach of the peace. There can be no doubt that both these conditions existed. The applicant was claiming to be in rightful possession of the lands in question on behalf of himself and his brothers. There had been a fracas between the adherents of the two parties at Jhando over the right to possess the shrine, and as would appear from the press communique issued by the Commissioner-in-Sind on 17th October 1922 about two hundred or three hundred followers of Pir Ahsanalishah had taken part in it and had caused injury to some of the followers of Pir Ziauddin Shah. It cannot for a moment be urged that there was no apprehension of a breach of the peace over the right to possess the lands in dispute which were claimed on behalf of Pir Ahsanalishah as being attached to the *gadi* of Pir Jhando. The Magistrate having been seized of jurisdiction could not be divested of it by the errors and omissions complained of which all relate to procedure and not to jurisdiction. In *Kamal*

Kutty v. *Udayavarama Raja Valia Raja of Chirakal* (1), the omission to state the ground in the preliminary order; in *Krishna Kamini* v. *Abdul Jabbar* (2) making only such persons a party as were actually in the dispute and who were likely to cause a breach of the peace; though it was brought to the notice of the Court that another person was interested in the property; and in *Sukhlal Sheikh* v. *Tara Chand Ta* (3), the failure to affix the notice at or near the disputed property, have been held not to affect the jurisdiction of the Court. The errors, no doubt, are grave and have rendered the proceedings extremely irregular. It is to be regretted that the learned Magistrate should have paid very little regard to the plain directions laid down for his guidance in s. 145, Cr. P. C., but we are not satisfied that these errors have in the circumstances of this case prejudiced the opponents or Pir Ahsanalishah. We further think that our refusal to interfere at this stage would be punishing the applicant for no fault of his. Though the preliminary order contained no description of the disputed properties or grounds of the learned Mgistrate's belief, the order read along with the petition of the 25th November 1922, gave clear notice to the opponents of what the disputed lands were and also of the grounds which had been relied on by the learned Magistrate, for issue of process. At a subsequent stage of the proceedings the lands in dispute were attached by order of the District Magistrate under s. 145 (4), Cr. P. C., and have remained in the custody of the Court upto now. The parties have gone to trial on every possible issue and knew exactly the nature of the dispute. It is, no doubt, true that Pir Ahsanalishah was claiming the lands in dispute and was, therefore, a proper party to be served with a notice under s. 145, Cr. P. C. But Pir Ahsanalishah had not trespassed on the lands in dispute. The persons who were likely to break the peace were the opponents and not Pir Ahsanalishah who had remained in the back-ground and has done so upto now.

It is not open to the opponents to urge that no order should be passed to the prejudice of the absentee Pir. They claim no personal interest in the land and any order passed against them under s. 145, Cr. P. C., would not, therefore, affact them. We are also not satisfied that the absentee Pir has been prejudiced either by the want of direct notice to him or the failure to affix the notice at or near the disputed land. These proceedings have been fought to their finish on his behalf and under his directions. If the lands were in his possession at the date of the attachment, it was for him to come forward and claim to be joined as a party concerned. The Court had to decide which of the parties before it was at the time of the order or within two months thereof, in possession of the subject-matter of the disputes. The order of the Court restoring possession of the attached lands to a third party who had not appeared before the Court or claimed them as his own is somewhat anomalous. If on account of his remaining absent Pir Ahsanalishah has not been able to put forward his case as best as he might otherwise have done, he has to thank himself. In view of our finding that the applicant was in possession of the disputed lands on behalf of himself and his brothers upto the date of the preliminary order or within two months thereof, we order that the disputed lands as specified in para. 1 of this complaint which does not include East Gojro be restored to him and that he do retain possession until legally evicted therefrom in due course of law.

P. B. A. *Application allowed.*
Z. K.

(1) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; 23 M. L. J. 499; (1912) M. W. N. 1154; 13 Cr L. J. 753.
(2 30 C. 155; 6 C. W. N. 737 (F. B.).
(3) 33 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618 (F. B.).

(s. c. 89 Ind. Cas. 158.)

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 29 OF 1925.
March 17, 1925.
Present:—Mr Daniels, J. C.
MULLA AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 96, 147—Rioting—Determination to settle quarrel by force—Private defence, right of, whether exists.

Where two parties which are at enmity with each other come to a certain place armed with the full determination to settle their quarrels by force and have a fight, they are both guilty of rioting and no right of private defence exists.

Queen-Empress v. *Prag Dat*, 20 A. 459; A. W. N. (1898) 117; 9 Ind. Dec. (N. S.) 654, relied on.

Application for revision against an order of the Sessions Judge, Hardoi, dated the 21st October 1925, upholding that of the Magistrate, First Class, Hardoi, dated the 9th January 1925.

Mr. *R. F. Bahadurji* for Mr. *J. Jackson*, for the Applicants.

The Government Pleader, for the Crown.

ORDER.—The applicants have been convicted of riot and of offences under ss. 324 and 325, Indian Penal Code, and were sentenced by the Trial Court to seven months' imprisonment each in the aggregate. The learned Sessions Judge on appeal reduced the imprisonment to five months, but in other respects dismissed the appeal. The applicants come here on the ground that the circumstances were sufficient to establish a right of private defence. The applicants belong to the party of one Baldeo. Baldeo and his younger brother Mayaram are at enmity. Both men had come to the village on the day preceding the riot to induce labourers to come and work for them on the following day. On the day in question both parties went down armed with *lathis* and spears. Baldeo's party arrived there first and secured the labourers. Maya Ram's party arrived shortly after. There was a shout of "*mar, mar*," and a general *lathi* fight ensued in which persons on both sides were injured. The learned Sessions Judge has come to the conclusion that the shouts of "beat, beat," and actual attack were begun by Baldeo's party. So far as the evidence in this case goes there is nothing to show which party first raised the shout. I am informed that this fact appears in the evidence of the first prosecution witness in the cross-case. As the evidence in the two cases was recorded separately it was an oversight on the part of the learned Sessions Judge that he did not bring it on the record in this case also. But even omitting this piece of evidence it appears clear that both parties had gone down fully intending to fight, and that no question of private defence arises on the part of the accused. It was so obvious that a riot was intended that the *chaukidar* had actually gone to the *thana* and reported the fact that a riot was imminent before fight began. Where both parties have come down armed with a full determination to settle their quarrel by force the case comes within the principles of *Queen-Empress* v. *Prag Dat* (1) and no right of private defence exists. I, therefore, dismiss this application.

Z. K. *Application dismissed.*

(1) 20 A. 459; A. W. N. (1898) 117; 9 Ind. Dec. (N. S.) 654.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 57 OF 1924.

July 17, 1924.

Present:—Mr. Rupchand Bilaram A. J. C.

ASSANMAL CHATUMAL—APPELLANT

versus

DILBAR AND OTHERS—RESPONDENES.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order for, when can be made—Appeal, right of, when arises.

Section 250 of the Cr. P. C. requires that the complaint or information given by the complainant should be false and either frivolous or vexatious. An order under this section on the ground that because a complaint is frivolous and vexatious, therefore, it is false is not legal [p. 159, col. 2.]

The right of appeal from an order under this section is not limited to cases where compensation awarded to each accused person exceeds Rs. 50, it is enough if the aggregate amount of compensation awarded to several accused persons exceeds the said sum. [p. 160, col. 2.]

Appeal against an order of the Special First Class Magistrate, Karachi.

Mr. *Motiram Idanmal*, for the Appellant.

ORDER.—This is an appeal against the order passed by the Special First Class Magistrate, Karachi under s. 250, Cr. P. C., awarding compensation to three of the five accused who were tried before him for an offence under s. 420, Indian Penal Code. In awarding compensation the learned Magistrate has in his order stated as follows:—

"I still hold that the case against the three accused women was frivolous and vexatious, hence false." Section 250, Cr. P. C., requires that the complaint or the information given by the complainant should be false and either frivolous or vexatious. The learned Magistrate's conclusion that because the complaint is frivolous and vexatious, therefore, it is false is not correct. On the evidence I am not satisfied that the information given by the complainant to the Police was false. In this information given by the complainant to the Police as recorded in the first report, the complainant has given full details of what transpired on that day. He states that a party of five foreigners consising of two males and three females visited his shop and asked for certain blankets. One of the blankets was approved and purchased for

Rs. 7-8-0. One of the male persons who accompanied the party gave a note of Rs. 100 to the complainant and asked for the balance of Rs. 92-8-0 being paid to him which was accordingly done. Then the party asked for certain *farasis* being shown to them and subsequently they changed their mind and told the complainant to take back the Rs. 92-8-0 which he had given to them and keep it with himself, and also the blanket which they did not want, that they wanted to make other purchases from him worth about Rs. 100 and then settle the account. The complainant did not count the money and put it in his box. They, however, made certain further purchases totalling a sum of Rs. 15 and then asked for the balance being paid to them and received Rs. 85 from the complainant. The complainant thereafter found that the accused had not returned to him all the Rs. 92-8-0 which he had given to accused No. 1 but Rs. 43-8-0 short.

In his first report to the Police the complainant has clearly stated that the person who dealt with him was one of the males, though he has made certain general statements that he had been deceived by the party. Now it appears that this party of five persons did not behave in this peculiar manner with the present complainant only but with another shopkeepers also and there were two complaints lodged with the Police against them though the present complaint was proceeded with and the second one was subsequently either dropped or disposed of by an order of discharge.

The complainant had missed his money. He placed all the facts before the Police. If the Police took action against all the five persons it was no fault of the complainant. Further more it cannot be said that the complainant had no reasonable grounds to suppose that all the five persons were in some way connected in defrauding him and the other shopkeeper whose shop they had previously visited and who sent word to him to be careful about the accused, which led him to count his cash and detect the fraud practised on him.

The learned Assistant Public Prosecutor has urged that this Court cannot interfere with the order of the lower Court as s. 250, Cr. P. C. as amended does not allow an appeal when the total amount of compensation to different accused persons exceeds Rs. 50 but allows an appeal when the compensation awarded to any one of the accused persons exceeds the sum of Rs. 50. Now cl. (3) of s 250, Cr. P. C., which confers this right of appeal on the complainant is as follows:—

"A complainant or informant who has been ordered by a Magistrate of the Second or Third Class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate."

This clause in no way limits the right of appeal only to cases when the compensation awarded to each accused exceeds Rs. 50 and I see no grounds why I should curtail this valuable right by reading into this clause the words "In the case of each accused person" and more so when the latter part of this clause provides that the complainant shall have the right of appeal with regard to the payment of compensation as if such complainant or informant had been convicted at a trial held by such Magistrate. Section 413, Cr. P. C., gives a right of appeal to an accused person who had been convicted and sentenced to pay a fine exceeding Rs. 50 and it would follow that then the complainant has been ordered to pay a sum exceeding Rs. 50 as compensation, whether it be to one or more than one accused person, he has been as if it were convicted and sentenced to pay a fine exceeding Rs 50 and has, therefore, a right to appeal against such order. The total amount which the complainant in this case has been ordered to pay is Rs. 150. This appeal is, therefore, competent.

I allow the appeal and order the compensation if already paid to be refunded to the complainant.

In this matter notices were issued to the three opponents and sent to the Persian Consul for service as they had left British India. The notices have returned unserved. It is not likely that the opponents will return to British India or be served as their addresses are not known. I have, therefore, considered it proper to dispense with the service of notices on them.

P. B. A. *Appeal allowed.*

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1155 OF 1923.

April 14, 1925.

Present:—Mr. Justice Stuart.

BHAGWAN DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SRI KISHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment, what amounts to Agent, authority of, proof of.

An acknowledgment of liability within the meaning of s. 19 of the Limitation Act must be in writing signed by the person to be charged or by some person authorized by him to make the acknowledgment. Where an acknowledgment is alleged to have been made by an agent, the authority of the agent to make the acknowledgment must be proved. [p. 161, col. 2.]

Second appeal against a decree of the Subordinate Judge, Basti, dated the 12th of April 1923.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—The only matter to be decided in this appeal is whether the plaintiff-appellants have the right to redeem a mortgage which was executed by Sheo Dayal in favour of Lachman in the year 1857. They sued to redeem five mortgages. They have been allowd four, but the Courts have held that the redemption of the mortgage of 1857 is time-barred. The suit was instituted in 1920, 63 years after the execution of the mortgage and, in order to redeem, it is necessary for the plaintiff-appellants to show that there are circumstances in the case which will permit the extension of the period permitted by Art. 148 of the First Schedule of the Limitation Act.

They argue that they have a right to extend that period. They base this alleged right first of all upon the existence of three alleged acknowledgments of liability in respect of the existence of the mortgage which, they say, fall under the provisions of s. 19 of the Act.

The first of these is a certified copy of the *khewat* of 1860 in which the mortgaged property is situated. Now it is sufficient to say here that there is nothing to show on the face of the copy itself which has been proved that anybody admitted that there was any mortgage in existence. Against the names of more than one person who is mentioned is placed the word "*mutwafi*" or "deceased" and an attempt has been made to argue that, inasmuch as at least one of such persons, was probably not deceased, instead of the word "*mutwafi*" the Court should boldly insert the word "*murtahin*" or mortgagee. The audacity of the suggestion is the only point in its favour. The lower Appellate Court would have been very wrong to make any such assumption. It is sufficient to say that there is nothing in the document, Ex. 22, which can possibly be called an acknowledgment in writing of the existence of the mortgage.

The next piece of evidence upon which the appellants rely is a report made by a Revenue Officer in 1884 at the time of Settlement. This is Ex. 15. The officer reports in this that Din Dayal made a statement to him in which he asserted that he was a mortgagee and from this assertion it might be gathered that he admitted to the officer the existence of the mortgage of 1857 in question. But it is to be noted that there is *no acknowledgment of liability made in writing signed by Din Dayal.* There is the note of the Revenue Officer to the effect that Din Dayal made an oral statement of an acknowledgment before him. That does not help.

I now come to the last point. In the Settlement proceedings of 1885, there is a proceeding verifying the *khewat*, Ex. 17, dated the 29th October 1885, to which Mahabir Prasad, Bhagwan Din, Het Ram and *Puran mortgagee* affixed their signatures. A man called Mahabir Prasad probably the Mahabir Prasad who signed on his own behalf signed on behalf of twelve other co-sharers including Din Dayal and Ram Prasad. There is nothing to show that Mahabir Prasad had any authority to admit the existence of the mortgage on behalf of Din Dayal and Ram Prasad or that he had any intention of admitting the existence of any such mortgage. He was not a person through whom the mortgagees derived title or liability.

It has been pointed out to me that under the authority of *Haji Sheikh Bodha* v. *Sukhram Singh* (1) I could presume that Mahabir was duly authorised to represent Din Dayal and Ram Prasad in this particular. It is only necessary to say that granting I could make the presumption I refuse to make it as there is nothing I can see to justify such a presumption.

I agree with the lower Court that there

(1) 83 Ind. Cas. 5; 22 A. L. J. 857; 10 O. & A. L. R. 981; (1925) A. I. R. (A.) 1; L. R. 5 A. 775 Civ.; 47 A. 31.

was here also no acknowledgment within the meaning of s. 19. I find that the appellant's case as to acknowledgments under s. 19 fails completely.

There remains the fact that in 1913 and 1914 the appellants' representatives-in-interest sold a portion of the mortgaged property to pay off certain of the liability *not* under the mortgage of 1857 but under other mortgages. The learned Counsel for the appellants has endeavoured to argue that by executing these sale-deeds the period of limitation was extended under the provisions of s. 20 of the Limitation Act. The s. 20 can have no possible application. This is not a question of interest on a debt or legacy having been paid or part of a principal of a debt having been paid to extend limitation. The question is of extending the period of redemption.

For the above reasons this appeal fails on every point and is dismissed with costs on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1040 OF 1920.

March 6, 1924.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

HAJI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JANUM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Joint decree in favour of several respondents—Representatives of one respondent not impleaded in time—Abatement of appeal in toto—*Ignorance of death of respondent, whether sufficient cause for setting aside abatement.*

Where a decree under appeal is a joint decree in favour of all the respondents, each one of whom is entitled to the benefit of the whole decree, and application for impleading representatives of a deceased respondent is made after the period of limitation, the appeal abates *in toto* and not only *qua* the deceased respondent. [p. 162, col. 2.]

Zainab Bibi v. *Rohila*, 39 Ind. Cas. 277; 23 P. R. 1917, distinguished.

It is not a sufficient reason for setting aside the abatement of an appeal that the appellant did not come to know of the respondent's death, which occurred at a place about 14 *kos* from the appellant's village, till 10 days before he applied to have the deceased's representatives impleaded. [p. 163, col. 1.]

S. Mir Nawab v. *Hardev*, 12 Ind. Cas. 871; 60 P. R. 1911; 42 P. L. R. 1912; 238 P. W. R. 1911 and *Jamna* v. *Sarjit*, 52 Ind. Cas. 510; 67 P. R. 1919, relied upon.

Second appeal from a decree of the District Judge, Jhelum, dated the 24th January 1920.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Zafrulla Khan*, for the Respondents.

JUDGMENT.—The parties are proprietors of the village of Mianwal in the Gujrat District. There is a tract of high lying land in the village known as Utar, while the low lying portion is called Hithar. In 1892 the Utar land was recorded by the order of the Collector as *shamilat deh*, although it had previously since 1868 been shown as divided into separate proprietary holdings. When an application for partition of the Utar land was made in 1915 a dispute arose as to the way in which the partition was to be made, and plaintiffs have in consequence sued for a declaration that they are entitled to get a share in proportion to the area (826 *kanals*, 8 *marlas*) which they owned before the mutation of 1892, and not, as contended by the defendants, in proportion to the revenue paid on the Hithar land. The Courts below have found in favour of the plaintiffs, who have been given a decree declaring that they are proprietors of 826 *kanals*, 8 *marlas*, or according to present measurements 898 *kanals*, 1 *marla*, and are entitled to get a share in the *shamilat* on the basis of that area. The defendants have filed a second appeal in this Court.

One of the plaintiffs-respondents, namely, Shahabal, was murdered in September 1922, and as the application for impleading his representatives was not made till July 1923, after the period of limitation had expired, the appeal has abated. It is contended for the appellants that the appeal abates only *qua* the deceased Shahabal and not against the other respondents but we do not agree with this contention. *Zainab Bibi* v. *Rohila* (1), which is relied upon, was a case in which the respondents were defendants and is not in point. The decree in the present case was a joint decree in favour of all the respondents, and each respondent is entitled to the benefit of the whole decree. The appeal must consequently abate *in toto*.

(1) 39 Ind. Cas. 277; 23 P. R. 1917

It is also contended for the appellants that the abatement should be set aside on the ground that they did not come to know of Shahbal's death, which occurred at a place about 14 *kos* from their village, till before ten days they applied to have his representative impleaded. Even if this allegation is correct, it would not be sufficient reason for setting aside the abatement [see on this point *S. Mir Nawab* v. *Hardev* (2) and *Jamna* v. *Sarjit* (3)].

This appeal having abated, we direct that it be struck off the file of pending cases. The appellants will pay the respondents' costs in this Court.

S. D. *Appeal abated.*

(2) 12 Ind. Cas. 871; 60 P. R. 1911; 42 P. L. R. 1912; 238 P. W. R. 1911.

(3) 52 Ind. Cas. 510; 67 P. R. 1919.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1149 OF 1921.

February 19, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Fforde.

SUKHRAM DAS—PLAINTIFF—APPELLANT

versus

NAZAR MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Decree set aside on appeal but restored in second appeal—Period for payment, extension of—Appellate decree, effect of.

A suit for pre-emption was decreed by the Trial Court. The vendee appealed and the Appellate Court set aside the decree of the Trial Court. The plaintiff then preferred a second appeal with the result that the decree of the Appellate Court was set aside and that of the First Court was restored. The plaintiff had failed to pay in the pre-emption price within the time prescribed by the Trial Court's decree:

Held, that the only effect of the decree passed in second appeal was to restore the decree of the Trial Court, and that it did not operate to extend the time for payment fixed in the Trial Court's decree, and that the plaintiff having failed to comply with the terms of the latter decree was not entitled to enforce that decree.

Second appeal from an order of the District Judge, Jhelum, dated the 7th February 1921.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Sham Lal* and Bakhshi *Sain Das*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of execution proceedings relating to a decree for pre-emption. The facts may be summarised below:—

The First Court passed a decree for pre-emption, in favour of the plaintiff on the 22nd March 1916, granting possession on payment of Rs. 1,200 by the 22nd May 1916, that is, within two months from the date of the decree. The vendee appealed against this decree and the Appellate Court having accepted his appeal set aside the decree, which had been passed by the Trial Court. The plaintiff then preferred a second appeal with the result that the decree and judgment of the Appellate Court were set aside and those of the First Court were restored. The decree-sheet prepared in the High Court recites the terms of the decree of the First Court. It may be mentioned that the successful pre-emptor did not deposit the pre-emption money within the time fixed or at any time before the decision of the High Court. The decree of the High Court was passed on the 2nd February 1920. The money was subsequently deposited on the 26th February 1920 and prayer for the delivery of possession over the property was made. Thereupon the vendee judgment-debtor filed objections to the effect that inasmuch as the condition laid down in the decree of the First Court relating to the payment of the pre-emption money within the two months had not been carried out, the decree-holder was not entitled to get possession in execution of his decree. This objection was disallowed by the First Court. On appeal to the lower Appellate Court the judgment of the First Court has been upheld and the vendee judgment-debtor has come up on second appeal to this Court. The lower Appellate Court has held that the High Court must have intended to extend the period of limitation and that, therefore, the money which was paid within 24 days of the passing of the High Court decree was paid within time, and that the plaintiff decree-holder had fulfilled the conditions. Against this finding of the learned Judge of the Court below objection is taken on the ground that this amounts to variation of the terms of the decree of the High Court. In our opinion there is force in this contention. It is quite clear that the learned Judges of the High Court simply intended to restore the decree of the First Court. They made no variations in the terms of that decree and if we were to accept the view of the lower Appellate Court the result would be that the terms of the decree of the First Court would have to be varied by substitut-

ing quite a different date for payment of money from that provided in the decree. In our opinion it is not in the power of the Executing Court to make any such variations. The result is that the appeal succeeds, the objections of the judgment-debtor are allowed and the application for execution is dismissed with costs.

Z. K. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 858 OF 1922.

February 17, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

DEVIBAI WIDOW OF MOHANDAS —PLAINTIFF

versus

DAYABHOY MOTILAL AND OTHERS —DEFENDANTS.

Hindu Law—Will—Direction postponing interest in property but making no provision for intervening period, validity of—Hindu testator, whether can dispose of property without providing for widow's maintenance—Mitakshara Law—Reversioners—Divided brother, whether preferred—Estoppel, requisites of.

A direction in a Will postponing the right of a legatee to take possession of a property till after he has attained majority would be invalid unless it is shown that the testator had conferred an interest in the property on some other person during the intervening period. [p. 168, col. 2.]

Weatherall v. *Thornburgh*, (1878) 8 Ch. D. 261 at p. 267; 47 L. J. Ch. 658; 39 L. T. 9; 26 W. R. 593, *Lloyd* v. *Webb*, 24 C. 44; 12 Ind. Dec. (N. S.) 694 and *Huseinbhoy* v. *Ahmedbhoy*, 26 B. 319; 4 Bom .L .R. 336, relied upon.

The right of a Hindu testator to make a Will is subject to his making adequate provision for the maintenance of his widow. He cannot so dispose of his property as to free it from her claim of maintenance. [*ibid.*]

Narbadabai v. *Mahadeo Narayan*, 5 B. 99 at p. 106; 3 Ind. Dec. (N. S.) 68, *Jamna* v. *Machul Sahu*, 2 A. 315; 4 Ind. Jur. 414; 1 Ind. Dec. (N. S.) 760, *Sorolah Dossee* v. *Bhoobun Mohun Neoghy*, 15 C. 292 at p. 306; 7 Ind. Dec. (N. S.) 779 and *Krishnarao Govind* v. *Bhagwantrao Govind*, 2 Bom. L. R. 1082, relied upon.

Under the Mitakshara Law, an undivided brother is preferred to a divided brother as a reversioner. [p. 169, col. 1.]

Jadubchunder Ghose v. *Benodbehary*, 1 Hyde 214 and *Keshub Ram* v. *Nand Kishore*, 11 W. R. 308; 3 B. L. R. A. C. J. 7, relied upon.

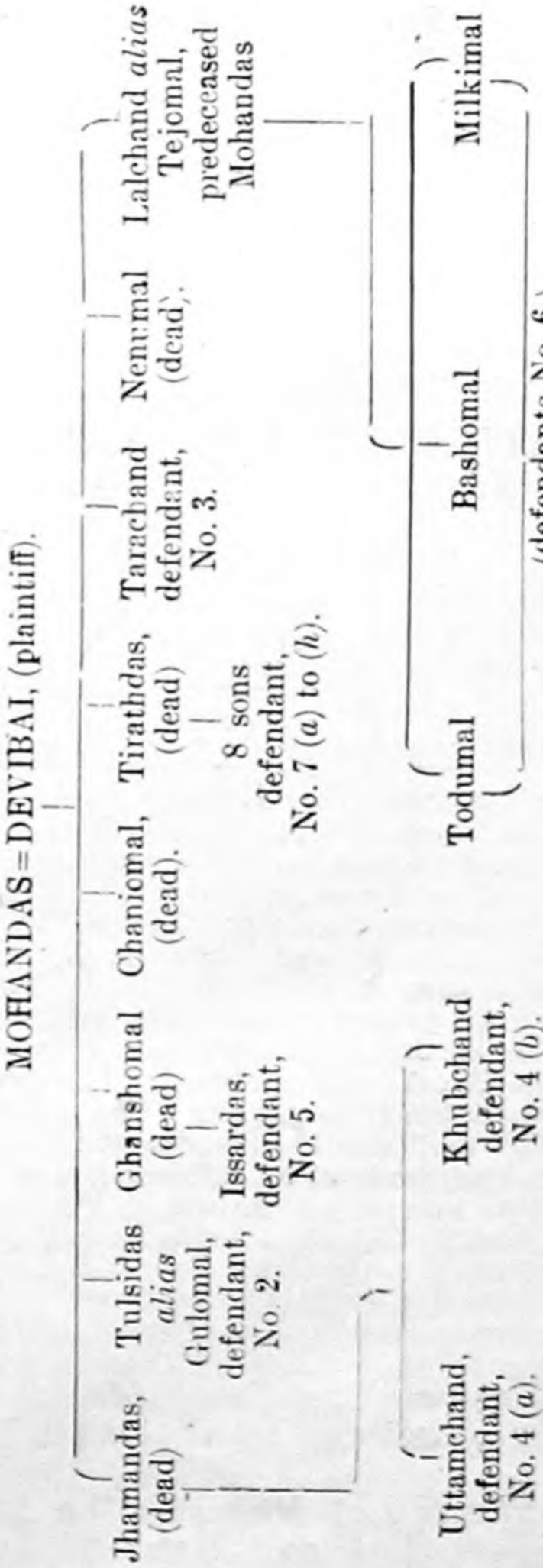
The doctrine of estoppel by representation is applicable to some state of facts alleged at the time to be in existence and not to a promise *de futuro* which if binding at all, must be binding as a contract. [p. 169, col. 2.]

Maddison v. *Alderson*, (1883) 8 A. C. 473; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821, relied upon.

Mr. *Kalumal Pahlumal*, for the Plaintiff.

Mr. *Jhamatmal Valiram*, for the Defendants.

JUDGMENT.—The plaintiff is the widow of one Mohandas who died in the year 1900. Defendants Nos. 2 to 7 are her sons and grandsons and are shown in the following tabular statement :—



Defendant No. 1 is the mortgagee of plot No. 101 sheet A-23 under a mortgage-deed executed by defendant No. 3 in his favour.

Since this suit he has also purchased the right, title and interest of defendant No. 3 in this house in execution of the mortgage decree passed in his favour.

The plaintiff who is about 92 years old, has filed this suit alleging that the house in suit was the residential house of Mohandas, and that by his Will dated 14th June 1920 he had declared that this house was to remain in her possession and enjoyment during her life and had bequeathed this house to two of his sons, defendant No. 3 and Nenumal, since deceased, in two equal shares and that on the death of Nenumal which took place in 1903, his half share had devolved on her as his mother, and that the mortgage created by defendant No. 3 in favour of defendant No. 1 was in no way binding on her interests in the property. She asked for a declaration that she was entitled to remain in possession and enjoyment of the mesne profits of the house in suit during her lifetime, and that the mortgage-deed in favour of defendant No. 1 was not binding on her and in any event it was void with regard to the half share of Nenumal. She also asked for an injunction restraining defendant No. 1 from bringing the house to sale.

Defendant No. 3 is *ex parte*. Defendants Nos. 2 and 4 to 7 have supported the plaintiff and have further claimed to be the reversioners in the half share of Nenumal in the house in suit.

Defendant No. 1 who is the only contesting defendant has raised several pleas. He has *inter alia* denied the *factum* of the Will, and has urged that the parties have all along dealt with the property of Mohandas as if no Will was made, that the house in suit had been awarded to defendant No. 3 at a partition between the sons of Mohandas, that it was sold by him in 1903 and re-purchased by him in 1911, and the rights, if any, of the plaintiff and defendants Nos. 2 and 4 to 7 are Statute barred. He has also relied on estoppel.

The following issues have been raised by the Court :—

1. Whether Mohandas Badaldas died making the alleged Will, or died intestate ?

2 Was any partition effected between the heirs of Mohandas on the latter's death, and if so, was the property in suit given to defendant No. 3 as his share on partition ?

3. (*a*) Is the alleged Will admissible in evidence without Probate being taken out for it ?

(*b*) Is the plaintiff estopped from setting up the Will for reasons mentioned in para. 4 of the written statement of defendant No. 1?

4. Does the alleged Will make any disposition of the property in suit ?

5. When did Nenumal die and did he acquire any interest in the property in suit ?

6. Is defendant No. 3 entitled to the property by right of survivorship to Nenumal ?

7. (*a*) Has the plaintiff or any of the defendants Nos. 2 and 4 to 7 relinquished their interest in the property ?

(*b*) Is defendant No. 1 alienee for value and without notice of the right of the plaintiff or any of the defendants Nos. 2 and 4 to 7, and if so, is his title complete against them ?

8. Was defendant No. 3 absolute owner of the property by reason of transfer in his favour as referred to in para. 7 (*a*) of the written statement ?

9. Whether defendant No. 3 re-purchased the property from Pessumal Naraindas and is he the absolute owner of it by reason thereof ?

10. Is the plaintiff entitled to any interest in the property or right of residence in it ?

11. When did the cause of action accrue in favour of the plaintiff, if any, and is the suit barred by limitation ?

12. Is the mortgage executed in favour of defendant No. 1 binding on the plaintiff ?

13. What order should be made with regard to costs of defendants Nos. 2 and 4 to 7 ?

14. General.

Issues Nos. 1, 2, 3 (*a*), 4, 8 and 9.

There can be no doubt on the evidence that Mohandas did make the Will Ex. 8. Defendant No. 2 (Ex. 9) who took an important part in having it made, the plaintiff (Ex. 11), Hassomal (Ex. 7) one of the attesting witnesses who is at present alive, have all deposed to Ex. 8 having been executed by Mohandas Tillomal, (Ex. 10) has proved the attestation of his brother Choithmal, another attesting witness to the Will since deceased.

The Will is written in Sindhi and probably at the dictation of the deceased himself, and appears on the face of it to be

genuine. The deceased had eight sons of whom one Lalchand *alias* Tejomal had predeceased him. All his sons except Tarachand defendant No. 3 and Nenumal, since deceased, who were both young then, were separate from him. In paras. 2 and 6 of the Will he has given the names of his sons and recited the fact of his being separate from them and in paras. 3 and 4 he has described his property as consisting of two houses, being house No. 3 valued by him at Rs. 4,000-0-0 and house No. 4 valued by him at Rs. 3,000-0-0 and his moveable property to consist of the *karkhanas* (*a*) a money lending business (*b*) a distillery at Kotri and (*c*) a liquor shop at Karachi in all of which one Uttumal and the Firm of Jesamal Valiram were interested. He has valued his not moveable assets at Rs. 12,000-0-0 after payment of a sum of about Rs. 3,000-0-0 due to Uttumal and Rs. 12,000-0-0 due to Jesamal Valiram.

Paragraphs 5, 7, and 8 are as follows :—

"5. So long as I myself am alive, so long will I retain in my possesssion and manage all the moveable and immoveable property as heretofore. But after my death it will remain in the possession of my wife named Devibai as long as she is alive; that is to say, my sons Jhamandas and Tulsidas *alias* Gulumal and Chanumal, and Chaniomal and Tirathdas will carry on the business of my three *karkhanas* and recover all the outstandings remaining due and allow the amounts realised to accumulate with my wife Devibai and they will defray the following expenses therefrom :—

1. The expenses of my illness and my funeral expenses upto 12 months and those of my wife Devibai for 12 months after her death including charity expenses will be all defrayed from my above mentioned funds.

2. They will defray the expenses of maintenance clothing and other necessary expenses of my two sons, No. 7 Tarachand and No. 8 Nenumal as well as those of their betrothal and marriage also out of the above property.

3. They will defray the reasonable expenses of Jasibai's marriage who is Tulsidas *alias* Gulumal's eldest daughter out of the said property.

4. They will pay Rs. 200 0 0 in all to my three grand-daughters, *i.e.*, the daughters of my daughter Kishnibai, when they marry on account of nuptial presents from maternal relations.

5. The wife of my son Tejumal deceased and his three sons will receive Rs. 12-0-0 a month on account of their maintenance and clothing expenses out of the said property from the date of my death to the expiry of five years.

6. My wife Devibai will also receive her maintenance and clothing expenses out of the said property up to the end of her life.

* * * * * * * *

"7. After the death of my wife my sons will get $8\frac{1}{4}$ share out of the moveable property which will remain after deducting the above expenses or the income of the *karkhana* when they will be continued as per details below:—

that is to say, $1\frac{1}{4}$ share will be taken by my eldest son 1 Jhamandas and one share by 2 Tulsidas *alias* Gulumal, 3 Ghanumal, 4 Chainomal, 5 Jethomal, Todumal and Basomal sons of Tejumal deceased by their guardian their mother *Musammat* Nickobai, 6 Tirathdas, 7 Tarachand and 8 Nenumal each.

"8. There remain only two buildings out of which one is a dwelling house plot No. 3 sheet A 23 in which I, testator, live. The same will be divided in equal share by my two sons No. 7 Tarachand and No. 8 Nenumal between themselves. My other sons and grandsons have no claim or interest in it. The remaining house plot No. 4 sheet A which is adjacent to plot No. 3 should also be divided in two equal shares, that is to say, one-half of it should go to the three sons of Tejumal, deceased, *i. e.*, Jethomal, Todumal and Bashomal, by their guardian their mother Nikobai and the other half should go to my sons Tirathdas No. 6 who is now at Amritsar. My other sons and grandsons have no right or interest whatever therein. Therefore, I got this will written out for myself, so that it may be used by the members of my family named above after my death. Dated 14th June 1900." It has been proved by certified copies from the Revenue Records, Exs. 5 and 6, that houses Nos. 3 and 4 referred to in the Will are plots Nos. 101 and 102 sheet A23 which adjoin one another, and that house No. 3 is the house in suit.

Defendant No. 1 who is a stranger to the family has produced certain documents to which the sons of Mohandas were parties wherein no mention has been made of the Will, and wherein defendant No. 3 has purported to deal with Mohandas' property as the sole surviving member of the joint

family consisting of himself and his father Mohandas. It is contended that in view of these documents the Court should hold that the Will was either not made or was by mutual consent treated as not having been made at all.

Exhibits 20 and 21 are certified copies of the judgment in Suit No. 122 of 1901 of the then District Court of Karachi and of the judgment of the Appeal Court in First Appeal No. 13 of 1905, arising out of the same suit. This suit was instituted by defendant No. 3 against Uttumal and the Firm of Jesamal Valiram for accounts of the three *karkhanas*, in his capacity as the sole surviving member of the joint family consisting of himself and his father, Mohandas.

Exhibit 23 is the certified copy of a sale-deed executed by Jhamandas and by defendant No. 3 in favour of one Pessumal by which defendant No. 3 has again purported to sell as sole surviving member of the joint Hindu family consisting of himself and his father house No. 3 for Rs. 1,100-0-0 and a half share in house No. 4 for Rs. 450 0 0 the whole being valued at Rs. 900-0 and Jhamandas has purported to sell the remaining half of house No 4 as co-owner with his father by right of purchase

Exhibits 25 to 27 are mutation proceedings dated 15th September 1904, wherein again the sons have joined in having houses Nos. 3 and 4 transferred to the name of Pessumal, showing that defendant No. 3 was entitled to the property left by his father and that half share in house No. 4 belonged to Jhamandas.

Exhibit 24 is a receipt dated 2nd March 1911 executed by Pessumal in favour of defendant No. 3 acknowledging the receipt of Rs. 4,000-0-0 as consideration for the re-sale of houses Nos. 3 and 4 to defendant No. 3.

Exhibit 16 is the mortgage-deed dated 12th August 1920 executed by defendant No. 3 and his sons in favour of one Lekhraj for Rs. 10,000-0-0 purporting to deal with the property as joint family property belonging to him and his sons.

Defendant No. 3 who was examined as a witness on behalf of defendant No. 1 has conveniently pleaded ignorance of what happened after his father's death on the pretext that he was too young then and that his brother Chainomal who is now dead managed his affairs and made him sign certain papers without his knowing what they were. He was about eighteen or nineteen years old when his father died. He knows English and has been a trader all his life though now in financial difficulties. He has intentionally refrained from speaking the truth with the object of helping the plaintiff who has very probably instituted the suit at his instance to prevent the family house from being sold in discharge of his debts. Defendant No. 3 has further stated that upto 1918 he did not know of the existence of this Will, and thereby has attempted to explain that some of the earlier documents were executed by him in ignorance of the existence of the Will. I am not prepared to accept his explanation. It is difficult to say now what reasons led the defendant No. 3 to institute the suit of 1901 in his own name as the sole surviving member of the joint family. But it is evident from those proceedings that instead of the *karkhanas* being an asset of the family, they showed a large debit balance. Shortly after the institution of this suit defendant No. 3 applied to withdraw from the suit. The Court, however, permitted the Firm of Jessamal Valiram to be transposed as the plaintiffs and to carry on the suit. The sale-deed of 1903 to which Jhamandas and defendant No. 3 were parties was evidently executed as a colorable deed to protect the immoveable property from the creditors the sale having been effected at a nominal value, and was followed up by mutation proceedings with the same object. It was then to the interests of the family to withhold the existence of the Will from the public.

Exhibit 22 is the certified copy of the order passed by the Court on 22nd February 1911 in execution proceedings of this Suit of 1901 recording satisfaction of the decree against defendant No. 3 on payment of Rs. 1,500-0-0 to the judgment creditors, Messrs. Jessamal Valiram. The object of the fraudulent transfer had been fulfilled and this order was followed by the receipt, Ex. 24, passed by Pessumal. All along some members of the family had continued to live in the two houses, the plaintiff and defendant No. 3 in house No. 3 and Tirathdas in house No. 4. According to the Will half of house No. 4 was given to Tirathdas and the other half to defendant No. 6 and on 15th August 1922 by an award Ex. 13, Tirathdas acquired the interest of defendant No. 6 in house No. 4 and became the full owner of this house. It would appear that though Mohandas' sons were prepared to help defendant

No. 3 against Jessamal Valiram and to suppress the Will, they acted on the Will all along and distributed the houses in accordance with the Will. There is otherwise no explanation why house No. 4 was given to Tirathdas and defendant No. 6 and subsequently taken over by Tirathdas in pursuance of the award. It would appear that the Will is not only valid but has been acted upon so far as the immoveable properties go.

On behalf of the plaintiff certified copies of certain proceedings in Suit No 3156 of 1921 of the Small Cause Court, Karachi, have been put in as Ex. 29 to prove that in 1918 long before the mortgages created by defendant No. 3 he had agreed to give a sum of about Rs. 700-0-0 to defendant No. 2 in satisfaction of his claim, as one of the reversioners to the estate of Nenumal, to the house in suit and that this suit was filed to recover the amount in pursuance of that agreement. It is said that this agreement and the proceedings also show that the Will has been acted upon. The alleged agreement is not written on a stamped paper. The proceedings resulted in an *ex parte* decree in favour of defendant No. 2. There is nothing to show that this agreement was not antidated and the suit instituted in September 1921 after the present mortgage in collusion with defendant No. 3 to throw a cloud on defendant's title and to render the residential house unsaleable. I have, therefore, excluded Ex. 29 from my consideration.

The fact that the Will was not proved, cannot affect its validity or its being relied on or admitted in evidence in this case. The Hindu Wills Act has not been extended to this Province.

I, therefore, hold on Issue No. 1 that Mohandas died testate; on Issue No. 2 that house No. 3 was retained by defendant No. 3 and house No. 4 taken over by Tirathdas and defendant No. 6 in pursuance of this Will and not in consequence of a partition between members of a joint Hindu family or between heirs of the separate estate of a Hindu intestate; on Issue No. 3 (*a*) that the Will, Ex. 8, is admissible in evidence though no Probate has been obtained; on issue No. 4 which was raised in view of the doubt as to the identity of house No. 3 being the same as Survey No. 101 survey sheet A-2 in the affirmative; on Issue No. 8 that the house was not transferred to defendant No. 3 as alleged; on Issue No. 9 that defendant No. 3 has acquired no greater rights than those possessed by him under the Will, Ex. 8, by reason of his having got them re-transferred to himself.

Issue No. 10. It has been contended that the Will, Ex. 8, confers on the plaintiff no rights over house No. 3 which has been absolutely gifted to defendant No. 3 and Nenumal and any direction in the Will postponing their right to possess the house after they had attained their majority was invalid unless it be shown that the testator had conferred an interest in the property to some other person during the intervening period: *Weatherall* v. *Thornburgh* (1), *Lloyd* v. *Webb* (2), *Husenbhoy* v. *Ahmedbhoy* (3) and that the mere declaration in cl. (4) of the Will that the plaintiff was to retain possession of all the property of the testator during her lifetime conferred no interest in the house in suit to her. I am not prepared to accede to the contention that the Will confers no intervening interest on the plaintiff in the house in suit. This house was the residential house of the deceased where he lived with the plaintiff up to his death and where the plaintiff has continued to live up to now. There is no provision in the Will either depriving the plaintiff of her right of residence in this house or providing her with another house. It is true that sub-cl. (6) of cl. (4) of the Will provides for her maintenance from the income of the *karkhanas* but this income was a debit balance. The right of the testator as a Hindu to make a Will was subject to his making an adequate provision for the maintenance of his widow. He could not so dispose of his property as to free it from her claim of maintenance. *Narbadabai* v. *Mahadeo Narayan* (4), *Jamna* v. *Machul Sahu* (5), *Sorolah Dossee* v. *Bhoobun Mohan Neoghy* (6), *Krishnarao Govind* v *Bhagwantrao Govind* (7). It may fairly be presumed that the testator intended to confer on her the possession of all his properties during her lifetime to enable her to maintain herself from such of them as may be available though in the first instance she could appropriate the income

(1) (1878) 8 Ch. D. 261 at p. 267; 47 L. J. Ch. 658; 39 L. T. 9; 26 W. R. 593.
(2) 24 C. 44; 12 Ind. Dec (N. S.) 694.
(3) 26 B. 319; 4 Bom. L. R. 336.
(4) 5 B. 99 at p. 106; 3 Ind. Dec. (N. S.) 68.
(5) 2 A. 315; 4 Ind. Jur. 414; 1 Ind. Dec. (N. S.) 760.
(6) 15 C. 292 at p. 306; 7 Ind. Dec (N. S.) 779
(7) 2 Bom. L. R. 1082.

of the *karkhanas*, if any, for her maintenance.

I, therefore, hold on Issue No. 10 that the plaintiff is entitled to retain possession of the house in suit during her lifetime and to reside in it and to maintain herself out of it.

Issues Nos. 5 and 6.—In view of my finding on Issue No. 10 these issues hardly arise in this suit. It has, however, been proved by evidence that Nenumal died after the testator. The Will gives him a vested interest in the house in suit subject to the rights of the plaintiff. My finding, therefore, on Issue No 5 is that Nenumal died after his father and acquired a vested interest in the house in suit. It is also not seriously disputed that the plaintiff as his mother is preferential heir. I hold on issue No. 6 in the negative.

Issues Nos. 3 (b) and 7 (a).—There is nothing to show that the plaintiff was ever consulted by her sons or that she agreed to the fraudulent transfers made by defendant No. 3 or that she was a party to any of the transactions of this defendant. She has all along remained in possession of the house. There was no obligation on her to assert her rights to the property under the Will, and no grounds have been urged to show how she is estopped by her conduct from now asserting her rights.

Defendants Nos. 2 and 4 to 7 have no existing rights, whatsoever. Defendant No. 3 has a vested right to a moiety of the property in suit, which he is undoubtedly entitled to on the death of the plaintiff. It would also appear that if he be alive then, he would have a preferential claim to the remaining half share of the property as a reversioner of Nenumal's interest in preference to defendants Nos. 2 and 4 to 7, an undivided brother being preferred under the Mitakshara Law to divided brothers; Mayne's Hindu Law para. 568; *Jadub Chunder Ghose* v. *Benodbehary* (8), *Keshub Ram* v. *Nund Kishore* (9). Defendants Nos. 2 and 4 to 7 cannot be estopped by what they may have done or omitted to do in respect of property to which they have no existing rights. As pointed out by Lord Selbourne in *Maddison* v. *Alderson* (10) the doctrine of estoppel by representation is applicable to some state of facts alleged at the time to be in existence and not to promises *de futuro* which if binding at all, must be binding as a contract. If the plaintiff is not estopped from disputing the claim of the mortgagee, the other defendants whose claim if any arises on her death would *ipso facto* be not barred by their conduct in representing that the defendant No. 3 was at present the absolute owner of the whole property.

Issues Nos. 7 (b) and 12.—These issues hardly arise. Defendant No. 1 cannot claim any greater rights than those which defendant No. 3 possesses, and cannot, therefore, disturb the plaintiff from her possession and enjoyment during her lifetime. It is not necessary now to consider who would be the next reversioner of the interests of Nenumal, after the plaintiff's death. I would, therefore, answer these issues by holding that the mortgage is not binding on the plaintiff, but would give no finding whether this mortgage would bind the reversioner who succeeds to the estate of Nenumal on the plaintiff's death.

Issue No. 11.—The plaintiff has all along been in possession and the cause of action accrued to her after 1921 when the defendant No. 1 attempted to enforce his mortgage. The suit is, therefore, within time.

Issues Nos. 13 and 14.—The plaintiff is entitled to a declaration that she is entitled to the possession and enjoyment of the house in suit during her lifetime and to an injunction restraining defendant No. 1 from enforcing his mortgage in such a way as to disturb her rights.

With regard to costs, I think it is a fit case in which defendant No. 3 should be made to bear the costs of the plaintiff, and that all the defendants should bear their own costs. Whether he has inspired this suit or not, he is undoubtedly responsible for this litigation, and I order accordingly.

P. B. A. *Suit decreed.*

(8) 1 Hyde 214.
(9) 11 W. R. 308; 3 B. L. R. A. C. J. 7.
(10) (1883) 8 A. C. 473; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 2193 OF 1923.
March 7, 1924.
Present :—Mr. Justice Campbell.
JAN MUHAMMAD—DEFENDANT—APPELLANT
versus
NASIR KHAN—PLAINTIFF AND NURAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Transfer to superior pre-emptor effect of.

A transfer of property to a superior pre-emptor during the pendency of a suit by another pre-emptor and after the last date on which the former could have sued for pre-emption, cannot be regarded as a transaction in which the transferee enforces his right of pre-emption.

Karam Ali v. *Sultan*, 10 Ind. Cas. 1007; 30 P. R. 1911; 187 P. L. R. 1911, relied on.

Mahmud Khan v. *Khuda Bakhsh*, 26 P. R. 1908; 145 P. L. R. 1908; 39 P. W. R. 1908 and *Sunder Singh* v. *Sajjan Singh*, 10 Ind. Cas. 367; 53 P. R. 1911; 164 P. L. R. 1911; 166 P. W. R. 1911, referred to.

Second appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 31st May 1923.

Mr. *F. A. Cooper* for Mr. *K. J. Rustomji*, for the Appellant.

Lala *Hargopal*, for the Respondents.

JUDGMENT.—This second appeal arises out of a pre-emption suit, and the appellant Jan Muhammad was a defendant who claimed that in exercise of his right of pre-emption he had acquired the land in suit by purchase from the vendee prior to the date of the plaintiff's suit.

The findings of fact of the lower Appellate Court are as follows. The original sale was dated the 31st of July 1919. The plaintiff's suit was filed on the 1st of July 1922. The ostensible price of Rs. 1,400 was not paid. Jan Muhammad produced a receipt dated the 5th of June 1920, and claimed that the sale to him was transacted on that date, but Jan Muhammad's sale was ante-dated in order to defeat the plaintiff's suit

This last finding must be taken to be that the transfer to Jan Muhammad was made after the date of suit and after the last date on which he could have sued for pre-emption, or at least that Jan Muhammad has failed to prove that it was before either of those dates. The case, therefore, is governed by the rule laid down in *Karam Ali* v. *Sultan* (1), where it was held that in such circumstances the second transfer cannot be regarded as a transaction in which the transferee was enforcing his right of pre-emption. In that ruling *Mahmud Khan* v. *Khuda Bakhsh* (2) was distinguished on those grounds; and *Sunder Singh* v. *Sajjan Singh* (3) in which *Mahmud Khan* v. *Khuda Bakhsh* (2) was expounded and followed, cannot help the appellant.

The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 10 Ind. Cas. 1007; 30 P. R. 1911; 187 P. L. R. 1911

(2) 26 P. R. 1908; 145 P. L. R. 1908: 39 P. W. R. 1908.

(3) 10 Ind. Cas. 367; 53 P. R. 1911; 164 P. L R. 1911; 166 P. W. R. 1911.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 361 OF 1922.
May 1, 1925.
Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.
GARBHU MAHTON—DEFENDANT—APPELLANT
versus
Musammat BIBI KHUDAIJATUNISSA AND OTHERS—PLAINTIFFS AND NARAYAN MAHTO—DEFENDANT—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 26—Occupancy holding—Mortgage by tenant—Death of tenant without heirs—Landlord, rights of—Mortgagee, position of.

The meaning of the provision contained in s. 26 of the Bengal Tenancy Act is that although the other property of an occupancy-*raiyat* dying intestate and without heirs escheats to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to exist but only that the occupancy right is terminated. The holding is then a holding without a tenant and must revert to the landlord. [p. 172, col. 1.]

Where an occupancy tenant can legally alienate or encumber his holding and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him, diminished, by virtue of s. 26 of the Bengal Tenancy Act, by the loss of the occupancy right. In such a case a mortgagee from the deceased occupancy tenant is entitled to retain possession of the holding until it is redeemed by the landlord or until his tenancy is otherwise lawfully determined. [p. 172, col. 2.]

Appeal from a decision of the Subordinate Judge, Patna, dated the 6th February 1922, reversing that of the First Court, Patna, dated the 17th August 1921.

Mr. *A. B. Mukherji*, for the Appellant.

Messrs. *Muhammad Yusaf* and *Khurshed Hussain*, for the Respondents.

JUDGMENT.

Ross, J.—This is an appeal by defendant No. 1 against a decree of the learned Subordinate Judge of Patna in a suit brought by the plaintiff respondent for recovery of possession of 51 acres of land in the following circumstances.

The plaintiff claims to be the proprietor of 16 annas of *Mauza* Simli Morarpur, *touzi* No. *Samelat* in which the land in suit is situated. The land was formerly the occupancy holding of two brothers, Nokha Mahto and Una Mahto. Nokha Mahto died leaving a widow, *Musammat* Bhatni. On his death the holding went by survivorship to his brother Una, who mortgaged it to defendant No. 1, on the 18th of November 1912. According to the allegation in the plaint which is not traversed in the written statement, Una Mahto died in the month of *Poos* 1326, that is, January 1919. On the 12th of January 1919, *Musammat* Bhatni, who had entered into possession of the holding on Una's death, entered a deed of sale of the holding in favour of defendant No. 1, in consideration of the dues under the earlier mortgage and of a sum of Rs. 50 advanced for the *sradh* of Una Mahto. The defendant No. 1 entered into possession of the property. The plaintiff claiming the property by right of reversion on the death of the last tenant without heirs, settled it with defendant No. 2. Criminal proceedings between defendant No. 1 and defendant No. 2 having terminated unfavourably to the latter, the plaintiff brought this suit.

The defendant pleaded that *Musammat* Bhatni lawfully entered into possession on the death of Una and conveyed the holding to him for legal necessity and that he was recognized by the landlords as tenant and, therefore, could not be ejected.

The learned Munsif held that *Musammat* Bhatni, being a brother's widow, was no heir under the Hindu Law. He found, however, that she was entitled to maintenance out of the entire property left by Una and that the landlord had no right to take possession of the land. He further found that she was in possession and that subsequently to the conveyance the defendant No. 1 was in possession and was recognized as tenant by one of the *maliks*, annoo Lal. He also found that the sale was for legal necessity and was valid and consequently he dismissed the suit.

On appeal the learned Subordinate Judge agreed with the finding of the Munsif that *Musammat* Bhatni was not a heir of Una Mahto. Differing from the Munsif he held that she had no right to convey the land and the conveyance conferred no title on the purchaser. He further held on the authority of *Muktakeshi Dasi* v. *Pullin Behari Singh* (1) that on the death of the last tenant without heirs the security of the mortgage created by him was extinguished. He was also of opinion that the fact that *Musammat* Bhatni sold the holding to defendant No 1 showed that she had no intention to charge it with her maintenance, and there was in fact no charge upon the property for her maintenance ; and, in the result, he decreed the suit.

In second appeal it is contended that as the plaintiff is only a co-sharer landlord, the most he is entitled to is joint possession with the defendant and that as he has framed his suit in ejectment, even this relief should not be given. It is further contended that the case of *Muktakeshi Dasi* v. *Pulin Behari Singh* (1) was wrongly decided and that if the landlord is entitled to the property, he must take it subject to the mortgage.

With regard to the first point the learned Counsel for the respondents has shown that in the grounds of appeal in the Court below it was stated that the learned Munsif was wrong in considering that the plaintiff was only a co-sharer landlord and ought to have considered that he was the 16 annas landlord ; and consequently the receipts granted by Kannoo Lal did not relate to the land in suit. He contended that this point was clear and was not disputed and that the decision of the learned Subordinate Judge was on the basis that the plaintiff was the sole landlord. Now in the written statement, although it is pleaded, that the landlord recognized the defendant No. 1 as tenant and recorded his name and granted him receipts, yet the statement in the plaint that the plaintiff is the 16 annas landlord is not expressly denied. In the judgment of the learned Subordinate Judge there is no reference to the finding of the Munsif, that the plaintiff was a co-sharer landlord and there is no discussion of this point. In view of the fact that the

(1) 1 Ind. Cas. 155; 13 C. W. N. 12; 8 C. L. J. 324.

suit was decreed in full, it must be taken that the judgment proceeded on the basis that the plaintiff was the sole landlord and the inference to be drawn is that the case was argued on that footing. This view finds support in the fact that the learned Subordinate Judge has not referred to or discussed the effect of the receipts granted by Kannoo Lal. I shall, therefore, deal with the case on the footing that the plaintiff is the sole landlord of the village in which the land in suit is situated.

The question then is what situation arose in law on the death of Una Mahto without heirs, because it was not contended for the appellant that *Musammat* Bhatni was a heir. Section 26 of the Bengal Tenancy Act occurs in Ch. V which deals with occupancy rights and lays down the law for the devolution of the occupancy right as follows: "If a *raiyat* dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immovable property: provided that in any case in which under the law of inheritance to which the *raiyat* is subject his other property goes to the Crown, his right of occupancy shall be extinguished." This seems to mean that although the other property of an occupancy *raiyat* dying intestate escheats to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to exist but only that the occupancy right is terminated, as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor. *Ram Mohan Pal* v. *Sheikh Kachu* (2). The holding is then a holding without a tenant and must revert to the landlord. This right of the landlord to the reversion where there are no heirs is clear on principle and is recognised by implication in *Sonet Kooer* v. *Himmut Bahadoor* (3) and is expressly recognised by this Court in *Sri Kanta Prasad* v. *Jag Sah* (4). So far as the decision in *Muktakeshi Dasi* v. *Pulin Behari Singh* (1) is to the contrary effect, I would respectfully differ from it.

The question then is, what reverted to the landlord? In *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (5) and in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (6) and in *Cavaly Vencata Narrainapah* v. *Collector of Masulipatam* (7), it was held in dealing with the escheat of a *zemindari* to the Crown that a mortgagee by a mortgage created by the last holder was entitled as against the Crown, who took the estate by escheat on the death of the widow for want of heirs, to possession of the estate under the mortgage as security for the amount advanced and interest, subject to the equity of redemption by the Crown. If property escheats to the Crown subject to equities there can be no reason why it should not revert to the landlord on the same terms. The question whether the holding in the present case reverts subject to the mortgage created by the last holder depends on whether the holding was transferable or not. Now in this case the transferability of the holding has never been questioned, but has been assumed. The transfer to defendant No. 1 is referred to in the plaint, but it is not questioned on the ground of non-transferability. If the last holder had sold the holding the landlord would have got nothing; as he has transferred it by way of mortgage, the landlord gets only the right to redeem. It seems clear that where a tenant can legally alienate or encumber his holding, as in the present case, and that holding reverts to the landlord on the death of the tenant intestate without heirs, what reverts is the estate that was in the tenant as encumbered by him, diminished, of course, by virtue of s 26, by the loss of the occupancy right. Now, Una Mahto mortgaged this holding to the defendant No. 1. The conveyance from *Musammat* Bhatni may be, and, in my opinion, is, without legal effect. But the position of the defendant No. 1 is at least that of a mortgagee in possession and he is entitled to retain possession until he is redeemed by the landlord or until his tenancy is otherwise lawfully determined. It is unnecessary to consider the decision of *Muktakeshi Dasi* v. *Pulin Behari Singh* (1) in this connection as that was a case of non-transferable holding.

(2) 32 C. 386; 9 C. W. N. 249; 1 C. L. J. 1 (F. B.).
(3) 1 C. 391; 25 W. R 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.).
(4) 84 Ind. Cas. 293; 6 P L. T. 237; 3 Pat. 818; (1925) A. I. R. (Pat.) 57.
(5) 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Suth P. C. J. 417; 1 Sar. P. C. J. 752; 19 E. R. 620.
(6) 8 M. I. A. 529; 2 W. R. P. C. 61; 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.
(7) 11 M. I. A. 619; 10 W. R. P. C. 47; 2 Suth P. C J. 103; 2 Sar. P. C. J. 338; 20 E. R. 233.

In *Cavaly Vencata Narrainapah* v. *Collector of Masulipatam* (7) the Judicial Committee observed as follows at page 636.* "This declaration is fatal to the respondent's claim to immediate possession of the *zemindari*, but it will leave the equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the order to be made on this appeal. But if they do not so agree, the order which their Lordships must recommend to Her Majesty, as a consequence of the before-mentioned declaration is, that the respondent's suit stand dismissed, without prejudice to the right of the Crown to redeem." In my opinion, the order to be made in the present case ought to follow the terms of that decision of the Privy Council.

The result is that the appeal must succeed and there will be a declaration that the plaintiff has a right to redeem the holding in suit and that if the parties can agree within fifteen days as to the terms of redemption, these terms will be embodied in the decree of this Court; and, in that case, each party will bear his own costs throughout. But if they do not so agree then the appeal will stand decreed and the plaintiff's suit will be dismissed with costs throughout, without prejudice to his right to redeem.

Mullick, J.—I agree.

Z. K. *Appeal accepted.*

*Page of 11 M. I. A.—[*Ed.*]

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 130 OF 1924.

May 12, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

RUDRA PRASAD PANDE AND OTHERS—DEFENDANTS—APPLICANTS

versus

MATHURA PRASAD PANDE AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 105, 115, Sch. II, para. 15—Arbitration in pending suit—Award—Order superseding award—Revision, whether ies—Appeal against final decree—Order, whether can be challenged.

An order under para. 15 of Sch. II to the C. P. C. superseding an award in a pending case is not open to revision, but may be challenged in an appeal from the decree ultimately passed in the suit.

Buddhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 564; 19 A.L.J. 558 and *Shah Muhammad Fakhruddin* v. *Rahimullah Shah*, 85 Ind. Cas. 502; 47 A. 121; L. R. 6 A. 22 Civ.; (1925) A. I. R. (A.) 458, followed.

Civil revision from an order of the Additional Subordinate Judge, Basti, dated the 16th of May 1924.

Mr. *N. P. Asthana*, for the Applicants.

Dr. *S. N. Sen*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against an order of the learned Subordinate Judge of Basti superseding an award made in a pending case and directing the suit to proceed on the merits. The parties referred the case to arbitration during the pendency of the suit. The arbitrator made an award. Objections were filed to this award. The learned Subordinate Judge held that those objections were valid objections, and passed an order superseding the award under r. 15, Sch. II of the C. P. C. The result is that the suit will proceed as if no reference to arbitration had been made; and it is in fact proceeding. A preliminary objection is taken that no revision lies under these circumstances as the case has not yet been decided. The Full Bench ruling in *Buddhoo Lal* v. *Mewa Ram* (1) is relied on in support of this argument. We find that the exact point raised in this preliminary objection was recently decided by a Bench of this Court in a reported case—*Shah Muhammad Fakhruddin* v. *Rahimullah Shah* (2). That also was an order superseding an award in a pending case. The learned Judges held that it was governed by the Full Bench ruling already referred to, and that at this stage no revision lay. They further pointed out that, if the suit ultimately went against the applicant, it would be open to him to attack the order superseding the arbitration under the provisions of s. 105 of the C. P. C. Following this ruling, with which we agree, we dismissed the present application with costs including in this Court fees on the higher scale.

Z. K. *Application dismissed.*

(1) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558.
(2) 85 Ind. Cas. 502; 47 A. 121; L. R. 6 A. 22 Civ.; (1925) A. I. R. (A.) 458.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 150 OF 1925.

March 19, 1925.

Present:—Mr. Findlay, Officiating J. C.

MAROTI AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

KRISHNARAO—DEFENDANT —RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. III, r. 11 —Decree sent to Collector for execution—Full satisfaction—Proceedings kept pending through mistake —Alienation after satisfaction, validity of—Lease granted by Collector in full satisfaction of decree, effect of—Surrender of holding to landlord, whether alienation.

If a decree has been in effect fully satisfied and nothing more remains to be done thereunder, the mere fact that the Collector keeps the execution proceedings pending cannot make void any transfer of the property subsequent to the date of complete satisfaction. A lease by the Collector to the decree-holder of the property attached, in full satisfaction of the decree, during the pendency of execution proceedings before him, puts an end to such proceedings. The decree-holder's promise to hold the decree fully satisfied if he obtains the lease in question comes within the definition of consideration in s. 2 (*d*) of the Contract Act. In such a case the decree is fully satisfied as soon as the lease is granted and there is no progressive satisfaction of the decree. [p. 175, col. 1.]

A surrender of his tenancy right by a tenant in favour of his landlord is not an "alienation" within the meaning of r. 11 of Sch. III of the C. P. C. and as such is not inoperative if made during the pendency of proceedings before the Collector. [*ibid.*]

"Alienation" literally means "to make a thing another man's," *i. e.*, something which was previously in the ownership of the alienator. [p. 175, col. 2.]

A transfer of property implies that the person in whose favour the property is transferred acquires the right of the transferor in the said property, but such an incident cannot be postulated of a tenant surrendering his tenant right in favour of his landlord. [*ibid.*]

Appeal against a decree of the District Judge, Nagpur, dated the 20th December 1923, in Civil Appeal No. 156 of 1923.

Mr. *D. P. Tiwari*, for the Appellants.

Mr. *M. B. Kinkhede*, R. B., for the Respondent.

JUDGMENT.—The facts of this case are sufficiently clear from the judgment of the lower Appellate Court and that of the Original Court. The two plaintiffs Maroti and Nathu have now come up in second appeal to this Court. I am really only concerned with occupancy fields Nos. 131 and 132 in *patti* No. 3 of *Mouza* Kohli, *Tahsil* Saoner, District Nagpur. These fields were mortgaged in 1880 to Ganpat Rao Sadashiv Deshmukh. In 1899 a decree was obtained on the mortgage and, after it had been made absolute, the proceedings went to the Collector. Instead of his selling the subjects, he granted a lease for 15 years commencing from the 6th of June 1903 to the decree-holder himself. Ganpat Rao, after holding possession of the fields for five years, gave a sub-lease thereof for the remaining 10 years to the defendant-respondent. In the meantime, Laxman and Govinda, the original tenants, gave a deed of surrender to the defendant in 1912, while on the 18th of February 1919 the defendant-respondent gave a perpetual lease of these fields to the plaintiffs for a consideration of Rs. 1,000. Another field was included in this transaction, with which we are not concerned. The plaintiffs, having been dispossessed of fields Nos. 131 and 132, came to Court, claiming damages in respect of their dispossession.

The lower Appellate Court's judgment clearly sets forth all the salient facts of this case, and there are only two points for consideration in the present appeal. The first of these is whether the surrender of 1912 was or was not made during the pendency of the proceedings before the Collector. In this connection Counsel for the appellants has referred to Ex. P-4, a copy of the order-sheet in the Collector's proceedings. This order-sheet shows that these proceedings were, as a matter of fact, kept formally pending until the expiry of the lease and that it was only thereafter in 1919 that the Civil Court was informed that the decree in question was duly satisfied.

It has, therefore, been suggested on behalf of the appellants that, rightly or wrongly, the Collector kept the proceedings pending until 1919 and that the surrender of 1912 was void, having been in contravention of r. 11, Sch. III, C. P. C. The learned District Judge has dealt with this point in para. 8 of the judgment. Assuming that the surrender was an alienation, he held that the surrender could not be said to have been effected while the Collector's proceedings were in reality pending.

For my own part, I can see no reason whatever for differing from the view taken by the lower Appellate Court. It seems to me clear that as soon as the decree-holder accepted the 15 years' lease the decree had been, in effect, fully satisfied and nothing more remained to be done thereunder. Even if the Sub-Divisional Officer incorrectly

kept the proceedings technically pending, this mistake cannot, in my opinion, alter the legal position. In my opinion, since the 15 years' lease had been accepted by the decree-holder, form C should have been at once returned to the Civil Court and the latter should have been informed that the decree was duly satisfied. In this connection the reasoning of Stanyon, A. J. C., in *Sonba* v. *Ganesha* (1), fully appeals to me and I can see no reason for differing therefrom. Counsel for the appellants has attempted to draw a distinction in the present case on the ground that the decree-holder himself was the lessee and was not a stranger who would ordinarily pay down at once cash consideration in whole or in part in respect of his obtaining the lease. I cannot see that this aspect of the case makes, in reality, any difference in the legal position. Here, the decree-holder made a contract with the Collector. He, in effect, gave a promise to hold the decree fully satisfied if he obtained the lease in question, and such a promise undoubtedly comes within the definition of consideration in s. 2 (*d*) of the Indian Contract Act. The present case cannot, in my opinion, be regarded as one of progressive satisfaction. Had it been so, the Collector's proceedings would rightly have been kept pending. After the grant of the lease the Collector's jurisdiction could not be invoked in respect of the matter dealt with in the Third Schedule to the C. P. C. I concur, therefore, with the learned District Judge in his finding that the surrender was not in reality made during the pendency of the Collector's proceedings.

Even, however, had my finding on the above point been the reverse of what it is, I am still of opinion that the present second appeal cannot succeed, because it seems to me that the surrender in question cannot be held to be an alienation within the meaning of r. 11, Sch. III, C. P. C. The relevant words used therein are "judgment-debtor or his representative-in-interest shall be incompetent to mortgage, charge, lease or alienate."

It is urged on behalf of the appellants that the surrender was necessarily an alienation. In this connection the only case-authority mentioned on behalf of the appellants is an unreported ruling in Second Appeal No. 42 of 1923, decided by Hallifax, A. J. C., on the 11th of July 1924. Therein the question at issue was not discussed at any length. In *Muhammad Sayeed* v. *Muhammad Ismail* (2) Stanley, C. J., and Banerji, J., held that the word "alienate" in s. 325 (*a*) of the old C. P. C., was used *ejusdem generis* with the words preceding, and manifestly contemplated a transfer which would have present effect; it would not, for example, include a devise which could have effect after the death of the testator. In *Birdhichand Malwadi* v. *Kashiram* (3), Ismay, J. C., held that a surrender by a tenant of his holding is not equivalent to a sale. In the case of such a transaction there is, in reality, no transfer of ownership but merely a merger of the lesser or tenant's right in the larger right. As rightly pointed out by the learned District Judge, a transfer of property implies that the person in whose favour the property is transferred acquires the right of the transferor in the said property, but such an incident cannot be postulated of a tenant surrendering his tenant right in favour of his landlord. "Alienation" literally means "to make a thing another man's", *i. e.*, something which was previously in the ownership of the alienator. With all respect, therefore, I am unable to accept the *obiter* of Hallifax, A. J. C., in the unreported case specified above, and I can see no reason for differing from the view of the lower Appellate Court that a surrender, such as we are concerned with in the present case, was not an alienation within the meaning of r. 11, Sch. III, C. P. C. The present second appeal, therefore, fails on both points. The appellants must bear the respondent's costs in this Court. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

Z. K.

(1) 17 Ind. Cas. 887; 8 N. L. R. 182.

(2) 8 Ind. Cas. 834; 33 A. 233; 7 A. L. J. 1176.

(3) 9 C. P. L. R. 122.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 96 OF 1924.

March 3, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

UMRAO—PLAINTIFF—APPELLANT

versus

NARAIN—DEFENDANT—RESPONDENT.

Mortgage—Mortgage-deed executed in lieu of previous

bond –Mortgage, invalid—Decree on basis of previous bond, whether can be given.

A deed which purported to be a deed of mortgage of tenancy rights was executed by the defendant in favour of the plaintiff, the consideration for the deed being a previous bond under which the defendant owed money to the plaintiff. In a suit by the plaintiff to recover the amount of the subsequent deed:

Held, that although the deed failed as a mortgage-bond owing to the fact that a mortgage of tenancy rights was illegal it could be treated as an acknowledgment of liability in respect of the debt due under the previous bond and that a decree could be passed in favour of the plaintiff on the basis of the previous bond.

Second appeal from a decree of the District Judge, Gonda, dated the 21st November 1923, upholding that of the Subordinate Judge, Bahraich, dated the 16th March 1922.

Mr. *Bishambharnath Khanna*, for the Appellant.

Mr. *H. N. Dass*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal. The plaintiff, Umrao, brought a suit for the recovery of Rs. 570 from the defendant on the basis of a deed executed by the latter on the 15th March 1920 for a sum of Rs. 449. The defence was that the deed was a deed of mortgage of tenancy rights and, therefore, it failed as such. On this defence being raised the plaintiff confined his claim to a simple money-decree only. That claim has also been rejected by the Courts below. The Court of Appeal has argued that the mortgage being void the plaintiff was not entitled to any compensation under s. 65 of the Indian Contract Act, 1872, and has distinguished the decision of their Lordships of the Privy Council in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (1).

I am of opinion that the plaintiff is entitled to succeed though on a ground somewhat different from the lines on which the decision of the Court below proceeds. The bond of the 15th March 1920 was admitted by the defendant and a perusal of it shows that it was executed merely in consideration of an old bond of *Magh Badi* 3rd, 1325 *Fasli*, that is 1918. The amount due under that bond, principal and interest, is stated to be Rs. 449. The bond of the 15th March 1920 may, therefore, fail as a mortgage but the old transaction of the loan between the parties stands and there is no reason to refuse to give relief to the plaintiff in respect of that transaction. The new bond may only amount to an acknowledgment of the liability for the debt due under the previous bond.

I, therefore, allow this appeal, set aside the decrees of the Courts below and grant a decree to the plaintiff-appellant for a sum of Rs. 449 and in view of the fact that he knowingly took a mortgage of tenancy rights which he must be presumed to have known was unlawful, I refuse to give him any costs in any Court, nor is he entitled to any interest for the reason that up to the date of the bond of the 15th March 1920 the interest on the previous loan is included in the sum of Rs. 449.

Z. K. *Appeal allowed.*

(1) 71 Ind. Cas. 629; 26 O. C. 223; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 33 M. L. T. 216; 5 P. L. T. 281; 2 Pat. L. R. 237 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1834 OF 1923.

December 19, 1923.

Present:—Mr. Justice Campbell.

GAHRU RAM—JUDGMENT-DEBTOR—APPELLANT

versus

TARA CHAND—DECREE-HOLDER—RESPONDENT.

Hindu Law—Joint family property—Son's interest, when liable to attachment and sale in execution of decree against son—Partition, son's right to enforce.

The interest of a Hindu son in joint family property in the possession of his father is liable to attachment and sale in execution of a decree against the son only if the son has the power to enforce partition of his share in his father's lifetime. But the general rule of Hindu Law in the Punjab is that the son cannot enforce such partition. [p. 177, cols. 1 & 2.]

Miscellaneous second appeal from an order of the District Judge, Multan, dated the 3rd July 1923.

Lala *Hargopal*, for the Appellant.

JUDGMENT.—The question for decision in this second appeal is whether the interest of a Hindu son in joint family property in the possession of his father is liable to attachment and sale in execution of a decree against the son. The First Court held that it is not on the authority of *Nathu Ram* v. *Mannu Ram* (1). The District Judge reversed this decision and relied for support on *Dhanpat* v. *Haku* (2).

(1) 58 P. R. 1880.

(2) 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.).

In regard to this latter ruling the learned District Judge was in error in saying that a Full Bench of four Judges held a son's share in co-parcenary property to be liable to attachment and sale. A Division Bench of two Judges followed the Privy Council decision in *Deendyal Lal* v. *Jugdeep Narain Singh* (3), and held that the share and interest of one co-sharer in joint ancestral estate may be sold in execution to satisfy a decree obtained against him personally, and the question arising in the case which was referred to a Full Bench of three Judges (not four) was a different one altogether. Moreover the co-sharer in that case was not a son but one of four brothers, and the *ratio decidendi* both in it and in *Deendyal Lal* v. *Jugdeep Narain Singh* (3) was that the judgment-debtor co-sharer although he might not be able to alienate or encumber his share in the joint property without the consent of the other co-sharers, nevertheless had the power under law of compelling partition of his share, and, therefore, a purchaser in execution sale could acquire against him a right limited to that of compelling partition.

In the Punjab the position of a Hindu son is peculiar. It has been laid down authoritatively by a Full Bench in *Hari Kishen* v. *Chandu Lal* (4), that, although, under the Mitakshara Law a son can enforce partition in his father's lifetime, this rule of Hindu Law does not obtain in the Punjab and in every case the onus of proving that a son has such a right lies upon the person affirming it. Amongst others previously decided cases quoted with approval was *Nathu Ram* v. *Mannu Ram* (1), where it was assumed as a guiding principle that the question whether a son's interest can be attached and sold during his father's lifetime depends upon whether the son could compel partition while the father was still alive. The learned District Judge in the case before me distinguished this ruling but not very successfully. There was a remand on the question of custom, but the party alleging that the son had the power, which the strict Mitakshara Law would give him, to enforce partition, was called upon to prove that he had that power by custom, and on his failure to establish any custom his claim was dismissed.

(3) 43 Ind. Cas. 667; 105 P. R. 1917.
(4) 113 P. R. 1886.

There can be little doubt that a decree-holder has the right to attach, and sell the undivided share of a Hindu son in joint family property in the possession of the father only if the son has the power to bring about a partition in his father's lifetime. The general rule of Hindu Law in the Punjab is that the son can not enforce such partition and it follows that the decision of the First Court in the present case was correct. I accept the appeal with costs, set aside the order of the learned District Judge and restore that of the First Court.

S. D. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 975 OF 1923.
March 26, 1925.

Present:—Mr. Justice Chakravarti.

DURLAV MONDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

HEM CHANDRA MUKERJEE AND ANOTHER—PLAINTIFFS AND OTHERS *Pro forma* DEFENDANTS—RESPONDENTS.

Landlord and tenant—Suit for enhancement of rent—Compromise between tenants and co-sharer landlord effect of—Suit, whether can proceed.

Where a suit for enhancement of rent has been instituted by the whole body of landlords, the mere fact that during the pendency of the suit one of the co-sharer landlords has compromised the suit with the defendants does not affect the competency of the suit. [p. 178, col. 1.]

Jogendra Narain Singha v. *Mohamed Ismail Choudhury*, 86 Ind. Cas. 1035; 52 C. 139; (1925) A. I. R. (C.) 637, followed.

Appeal against a decree of the District Judge, Birbhum, dated the 13th December 1922, reversing that of the Munsif, First Court at Rampurhat, dated the 28th of February 1921.

Moulvi *Nuruddin Ahmad*, for the Appellants.

Babu *Abinash Chandra Ghose*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants and arises out of a suit for rent at an enhanced rate. It appears that during the pendency of the suit in the Trial Court one of the co-sharers owning 4-annas of the proprietary rights compromised th

suit with the defendants acknowledging them to be *raiyats* at fixed rate. After this compromise was filed an objection was taken on behalf of the defendants that the suit after the compromise ceased to be a suit by the whole body of the landlords and, therefore, was not maintainable.

The learned Munsif held that the suit having been properly instituted could not be rendered incompetent by one of the co-sharers compromising the suit with the defendants. That view was upheld on appeal by the learned District Judge.

The learned Vakil for the appellants, the defendants in the suit, urged two points before me. The first point was that in the circumstances which had happened the suit was incompetent as a suit for enhancement of rent. The second point was that upon the facts found the presumption under s. 50 of the Bengal Tenancy Act ought to have been raised in favour of the defendants.

As to the first point it appears to me that the question is covered by the authority of the case of *Jogendra Narain Singha* v. *Mohamed Ismail Choudhury* (1). On principle it seems to me also that the subsequent conduct of one of the plaintiffs could not affect the competency of the suit as it was instituted by the whole body of the landlords. There is nothing in law to prevent one of the parties to a suit to compromise with his adversary and to agree to a decree so far as they are concerned. But that could not stop the course of the suit as between the contesting parties. I am not aware of any provisions of law which could alter the nature of a suit by subsequent acts of the parties as was done in the present suit. I think, therefore, the learned District Judge was right in his view that the suit was maintainable.

As to the second point, I think there is no substance in it. The finding of the learned District Judge is that there was a variation of the *jama* after the year 1287. That being so, the presumption under s. 50 of the Bengal Tenancy Act cannot be raised.

The result is that this appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 86 Ind. Cas. 1035; 52 C. 139; (1925) A. I. R. (C.) 637.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO 497OF 1923.

March 12, 1925.

Present :—Mr. Hallifax, A. J. C.

ATMARAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Sapindas—*Full blood and half blood—Privy Council*, obiter *of, how far binding.*

Under the Hindu Law among *sapindas* up to the seventh degree, the relations of the whole blood exclude the relations of the half blood, provided they are otherwise equal in degree; beyond the seventh degree there is no difference between the whole blood and the half blood. [p. 179, col. 1.]

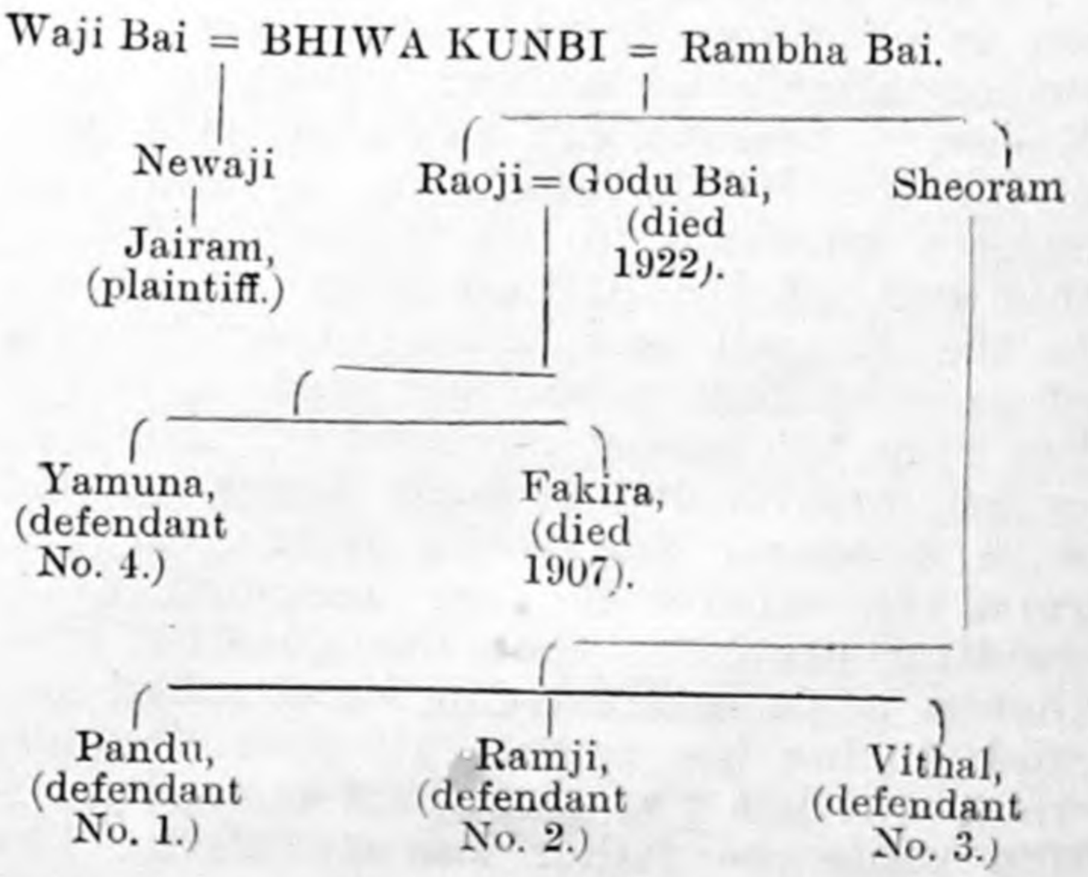
Where different views of a point of law are possible, that expressed by the Privy Council even *obiter* must be accepted. [*ibid.*]

Appeal against a decree of the Additional District Judge, Chanda, dated the 25th August 1923, in Civil Appeal No. 42 of 1923.

Mr. *M. R. Bobde*, for the Appellants.

Mr. *D. P. Tiwari*, for the Respondents.

JUDGMENT.—The following table shows the relationship of the parties.



The last male holder of the property in dispute was Fakira, who died in 1907. It passed then to his mother and on her death in 1922 the succession again opened up. Both Fakira's uncles died before his mother, and the dispute is between his three first cousins of the whole blood on the one hand and his first cousin of the half blood on the other. His sister Yamuna was joined as a defendant in the suit but has no concern with it.

In both the Courts below it has been

held that the preference of the full blood to the half blood for inheritance extends to all *sapindas* and is not confined to brothers and brothers' sons, but is confined to cases where the competing claimants are otherwise of equal degree. This excludes Jairam the cousin of the half blood and he has appealed, urging that the correct interpretation of the Sanskrit texts is that propounded by the Bombay High Court in *Vithalrao* v. *Ramrao* (1).

The opinion of the learned Judges that the rule of exclusion was applicable only to brothers and brothers' sons was not very confidently expressed. The judgment of the Allahabad High Court in *Suba Singh* v. *Sarafraz Kunwar* (2), which they found themselves unable to follow, was followed and explained by the same Court in *Kesri Rohan* v. *Ganga Sahai* (3) and the view taken was confirmed by their Lordships of the Privy Council in *Ganga Sahai* v. *Kesri* (4).

It has been suggested that the matter was not strictly in issue in the Privy Council case, and their Lordships' remarks on it are *obiter*, because of the rival claimants the relation of the half blood was nearer in degree than those of the whole blood. That is to a certain extent true, but there can be no doubt about their Lordships having approved the whole of the proposition set out in the two Allahabad cases mentioned. Further where different views of a point of law are possible, that expressed by the Privy Council, even *obiter*, must undoubtedly be accepted.

The rule of Hindu law then is this. Among *sapindas* up to the seventh degree the relation of the whole blood excludes the relation of the half blood, provided they are otherwise equal in degree; beyond the seventh degree there is no difference between the whole blood and the half blood. The appeal must accordingly be dismissed. The appellant will pay all the costs.

G. R. D. *Appeal dismissed.*

(1) 24 B. 317; 2 Bom. L. R. 139; 12 Ind. Dec. (N. S.) 746.

(2) 19 A. 215; A. W. N. (1897) 53; 9 Ind. Dec. (N. S.) 142.

(3) 6 Ind. Cas. 364; 32 A. 541; 7 A. L. J. 560.

(4) 30 Ind. Cas. 265; 37 A. 545; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 22 C. L. J. 508; (1915) M. W. N. 713; 42 I. A. 177 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 772 OF 1923.

April 9, 1925.

Present :— Mr. Justice Mukerji.

M. MAHADEO PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARBANS SINGH—DEFENDANT—RESPONDENT.

Landlord and tenant—Fixed rate tenant—Transfer of tenancy—Transferee, whether entitled to occupy house of transferor.

Where a fixed rate tenant transfers his tenancy, the transferee has a right to occupy the house of the late tenant in the same way as the fixed rate tenant, if the house is needed for effectual cultivation of the tenancy. [p. 180, col. 1.]

Thakurji Maharaj v. *Anant Bharthi*, 69 Ind. Cas. 834; 20 A. L. J. 922; (1922) A. I. R. (A.) 538, followed.

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 6th February 1923.

Dr. *S. N. Sen* and Messrs. *K. Verma*, *Kamuda Prasad*, *Gadadhar Prasad* and *Ambika Prasad*, for the Appellants.

Dr. *M. Waliullah*, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. The appellants who were the plaintiffs in the Court of first instance sued to recover the site of a certain house on the following allegations. The house belonged to a fixed rate tenant, *viz.*, Sitla Bakhsh, that he having died, his wife inherited the tenancy, and that she on the 25th of April 1917 sold her occupancy rights to the respondent as also her residential house. The plaintiffs, who are the landlords of the village, urge that there is no custom in the village justifying the transfer of the site of the house and asked the defendant to remove the materials and to vacate the site. The suit was dismissed by both the Courts below. The Appellate Court was of opinion that there was no custom by which a transfer of the site could be effected; but it was also of opinion that the house was purchased because the purchaser of the tenancy had no suitable place to live in for the purpose of cultivating the land. Indeed, the learned Subordinate Judge found that the house in dispute was required for the cultivation of the 9 acres of fixed rate tenancy land and was actually used for keeping cattle etc., Following a ruling, *viz.*, *Thakurji Maharaj* v. *Anant Bharthi* (1), the learned Judge dismissed the appeal.

(1) 69 Ind. Cas. 834; 20 A. L. J. 922; (1922) A. I. R. (A.) 538.

In this Court it has been urged that the learned Judge's finding was not sufficient for the disposal of the case. At one place in his judgment the learned Subordinate Judge remarked that in a portion of the building sold, a carpet factory was maintained and in another portion some cattle were kept and the rest of the house was used "for odds and ends." I have already quoted the actual finding of the learned Judge, *viz.*, the house was required for cultivation of the land sold. It was only in discussing the evidence that the remarks quoted above were made.

In the case of *Thakurji Maharaj* v. *Anant Bharthi* (1), it was held that where a fixed rate tenant transfers his tenancy, the transferee has a right to occupy the house of the late tenant, in the same way as the fixed rate tenant, if the house is needed for effectual cultivation of the tenancy. I do not find myself in a position to differ from the ruling which was given by two learned Judges of this Court. There can be no doubt that much can be said on the other side. But after all, it is a matter which would not frequently occur and it is necessary that the law on a point like this should be settled.

I think in the circumstances, the decree appealed against was right and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1420 OF 1922.

March 26, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

YEAR MAMUD MONDAL—PLAINTIFF—APPELLANT

versus

PAOMOCHA SARKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease, inadmissible—Tenancy, whether can be proved otherwise—Ejectment suit—Possession, previous, whether sufficient to support title.

A tenancy or relationship of landlord and tenant may be proved by means other than a written lease. [p. 181, col. 1.]

Manik Borai v. *Bani Charan Mandal*, 10 Ind. Cas. 469; 13 C. L. J. 649, followed.

Beni Madhab Christian v. *Raj Chandra Pal*, 2 Ind. Cas. 202; 14 C. W. N. 141, dissented from.

The mere fact of previous possession is not enough to support title in a suit in ejectment, even against a trespasser. [p. 181, cols. 1 & 2.]

Case-law referred to.

Appeal against a decree of the Subordinate Judge, Second Court at Pabna and Bogra, dated the 17th March 1922, confirming that of the Munsif, Second Court, Serajgunj, dated the 24th January 1921.

Babu *Nripendra Chandra Das*, for the Appellant.

Babu *Nilratan Banerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for *khas* possession of a fishery after establishment of the plaintiff's title to it. The plaintiff's case was that he was in possession of this fishery for sometime and after the expiry of the previous *jama* in *Kartick* 1319 he applied for a fresh *jama* for 10 years which was granted by what he called a *likhan* dated the 2nd *Magh* 1319. It is alleged that the defendants subsequently dispossessed him from the fishery in *Pous* 1326 and hence this suit.

Both the Courts below have dismissed the plaintiff's suit on the ground that the *likhan* on which he based his title was really a lease for 10 years and, therefore, it was necessary that it should be registered; and as it was unregistered it conferred no title on the plaintiff, he was, therefore, incompetent to sue for recovery of possession from the defendants. No evidence was taken in this case in the Courts below.

Two points have been raised in this appeal, first, that the *likhan* which the lower Courts treated as *pottah* is in the nature of an *amalnama* and, therefore, it is not compulsorily registrable. On this point we had the document placed before us and we agree with the Courts below in holding that this document is a lease granting 10 year's enjoyment of the fishery and, therefore, as such it must be registered before it can be used in evidence. The second point is that the plaintiff is unable to prove his title by the *pottah*, his tenancy may be proved by other means, namely, by payment to and acceptance of rent by the superior landlord. On this point the findings of the lower Courts are that it does not appear that rent was paid and accepted in the year in which the suit was brought and that there was no evidence (excluding the lease or the *pottah* above referred to) that the plaintiff's title subsisted in the fishery and so the suit was held to be not

maintainable. In support of the view urged by the plaintiff-appellant reliance has been placed upon the case of *Beni Madhab Christian* v. *Raj Chandra Pal* (1), where it has been held that a tenant who was in possession of the land under an invalid lease is entitled to recover possession from a mere trespasser. This view has not been uniformly accepted by this Court. So far as that case lays down that a tenancy or relationship of landlord and tenant may be proved by means other than the written lease, the principle of law has been accepted, but when it says that "a plaintiff in ejectment must, of course, prove his title but here it was not necessary for the plaintiffs to establish their *mokarrari* lease for their bare possession was a sufficient title against the appellants," the subsequent cases refused to follow it. In *Manik Borai* v. *Bani Charan Mandal* (2), Mookerjee, J., commenting on this case observed as follows: "We must not, however, be taken to express any opinion as to the other ground mentioned in the judgment [in the case of *Beni Madhab Christian* v. *Raj Chandra Pal* (1)], namely, that as the plaintiff had proved prior possession, bare possession was sufficient title against the defendant trespasser. The learned Judges when they founded this conclusion upon the decision of the Bombay High Court in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (3) apparently overlooked that the contrary view had been adopted by this Court in the case of *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (4), *Shama Churn Roy* v. *Abdul Kabeer* (5) and *Nisha Chand* v. *Kanchiram* (6) in which it was held that mere previous possession does not entitle a plaintiff to a decree for the recovery of possession, except in a suit under s. 9 of the Specific Relief Act which must be brought within six months from the date of dispossession." In support of this view reference may also be made to the case of *Ram Chandra Sil* v. *Ramanmani Dasi* (7). So far as this Court is concerned, it must now be taken to be the settled law that the mere fact of previous possession is not enough to support title in a suit in ejectment even against a trespasser. The case of *Beni Madhab Christian* v. *Raj Chandra Pal* (1) may also be distinguished on account of its special feature as there was a finding in it that the "possession of the plaintiffs as such tenants continued until they were ousted by the appellants, and was, for the purposes of this suit, a sufficiently good title against the latter." We are not prepared to follow the case of *Beni Madhab Christian* v. *Raj Chandra Pal* (1) in this contention and we must hold that the document on which the plaintiff relied for establishment of his title and of recovery of possession, being not admissible in evidence he is not entitled to any relief in this suit.

In this view the decree of the lower Appellate Court must be confirmed and this appeal dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 2 Ind. Cas. 202; 14 C. W. N. 141.
(2) 10 Ind. Cas 469; 13 C. L. J. 649.
(3) 3 B. 215; 6 Ind. Jur. 416; 3 Ind. Dec. (N. S.) 601.
(4) 17 C. 256; 8 Ind. Dec. (N. S.) 709.
(5) 3 C. W. N. 158.
(6) 26 C. 579; 3 C. W. N. 568; 13 Ind. Dec. (N. S.) 972.
(7) 36 Ind. Cas. 890; 20 C. W. N. 773.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 72-B OF 1924.
November 18, 1924.
Present:—Mr. Kotval, A. J. C.

P. D. BOLTON, OWNER OF BOLTON, FINE ART LITHO WORKS, TARDEO, BOMBAY—DEFENDANT—APPLICANT
versus
HARJIWAN ULLABHJIWAN—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Agreement to supply goods—Breach—Suit for damages—Place of suing.

A suit for damages for the breach of a contract to supply goods is maintainable at the place where the price of goods agreed to be sold is made payable under the terms of the contract.

Ram Lal v. *Bhola Nath*, 59 Ind. Cas. 359; 42 A. 619; 18 A. L. J. 749; 2 U. P. L. R. (A.) 254, followed.

Application for revision of a decree of the Small Cause Court Judge, Amraoti, dated the 31st January 1924.

Mr. *G. R. Deo*, for the Applicant.

Mr. *M. R. Bobde*, for the Non-Applicant.

ORDER.—According to the terms of the contract (see Ex. P-5) the price was payable in Amraoti and the Court at that place had, therefore, jurisdiction. *Ram Lal* v. *Bhola Nath* (1).

(1) 59 Ind. Cas. 359; 42 A. 619; 18 A. L. J. 749; 2 U. P. L. R. (A.) 254.

The clause "Price:—At one rupee two annas per thousand labels delivered here in my works," means that the price if delivery is taken at the works is the one mentioned and does not include any forwarding charges. The term "Forwarding:—Under V. P. system," is a substantive part of the contract and the price then became payable at Amraoti. There is no force, therefore, in the contention that the Court at Amraoti had no jurisdiction.

The plaintiff's suit for refund of the advance and damages is based on the allegation that the defendant failed to supply the labels within the stipulated time and thus committed a breach of the contract. The contract admittedly took place on the 14th December 1922. On the 7th January the plaintiff wrote to the defendant asking him to send 5,000 labels "before despatching the whole number in order to verify the printing and quality," 12,000 labels were despatched on the 7th February 1923. On the 10th February 1923 the plaintiff sent a wire to stop work and a letter stating that the cap had been printed red instead of black. The labels were printed in colours from a photograph in which the cap resembles in shape and outline a Fez, and the mistake, if any, was obviously an honest mistake, and it seems the plaintiff also thought so. He desired the colour to be changed to black. This was done and two lots of 28,000 and 86,000 were despatched on the 9th and the 13th March 1923 and were accepted by the plaintiff. On the 2nd May 1923 the plaintiff wrote a letter cancelling his order as to the balance of the labels (*sic*) was running on the machine and on the 17th May despatched 1,29,000 which the plaintiff refused to accept.

It is contended for the plaintiff that time was of the essence of the contract and that the defendant was bound to deliver the goods within three months at the most of the 14th December 1922. The plaintiff had not sought to impose any condition as to the time within which he desired the labels to be delivered. Apparently it was for his own protection from an imputation of delay that the defendant gave the confirmation of the order. Under these circumstances time does not appear to have been of the essence of the contract. The plaintiff himself made no complaint about the delay after he had received the consignment of the 13th March 1923 till the 2nd May when he cancelled the order. In the circumstances narrated above it may fairly be held that the order was not confirmed till the 10th February 1923 when final definite instructions as to the printing were given. For the mistake in the colour of the cap the defendant was certainly not to blame. The plaintiff had given no instructions whatever as to the colour As I have already said the cap in the photo might be taken for a Fez or a Persian cap. The delay that actually took place was not unreasonable. The plaintiff himself committed a breach of the contract when he refused to accept the consignment of the 17th May. The suit is dismissed with costs throughout.

G. R. D.

Z. K. *Suit dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL No. 15 OF 1925.

March 4, 1925.

Present:—Mr. Dalal, A. J. C.

AMBIKA PRASADA AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

ATHAR ALI—DECREE-HOLDER—RESPONDENT.

Execution of decree—Construction of grant—Perpetual lease without power of alienation—Sale in execution of decree—Re-transfer in favour of lessee—Attachment in execution of another decree—Objection that property not transferable, whether can be taken.

The judgment-debtor obtained under a decree a perpetual lease of the property in dispute without right of alienation on payment of a certain rent. The property was subsequently put up to auction in execution of a decree obtained against the judgment-debtor and was sold. Subsequently the auction-purchaser re-conveyed the property to the judgment-debtor for valuable consideration. Later on another decree was obtained against the judgment-debtor and the property was again attached and put up to sale. The judgment-debtor objected that the property was not liable to sale:

Held, that the property having already been transferred on two occasions, the original condition against alienation was no longer operative and that the judgment-debtor's objection could not be upheld. [p. 183, cols. 1 & 2.]

Appeal from the order and decree of the Subordinate Judge, Gonda, dated the 14th November 1924.

Mr. *Aditya Prasad*, for the Appellant.

Mr. *H. D. Chandra*, for the Respondent.

JUDGMENT.—The decree-holder Athar Ali attached landed property of the judgment-debtors Ambika Prasad and Aditya Prasad and the objection of the judgment-debtors was that the interest which they held in the property was not liable to sale. The contention was that they had obtained the interest under a decree of the Commissioner of Fyzabad, dated 14th March, 1874, passed against the *taluqdar* under which they were granted a perpetual lease of the property without right of alienation on payment of rent which was equal to the Government revenue with an addition of 40 per cent. The Court executing the decree held that the interest was transferable.

If nothing had happened subsequent to the decree of the 14th of March, 1874, I would have referred the matter to a Bench of two Judges of this Court in view of the ruling of a Bench of this Court in the case of *Muhammad Abdul Karim Khan* v. *Niwaz Singh* (1).

It is wrong to say that the title of the judgment-debtors rests at present on the decree of 1874. Subsequent to that decree Mohammad Ali, who happens to be the father of the respondent, Athar Ali, had this very property put up to auction in execution of his decree against the grandfather of the present judgment-debtors by name Ramadhin. After the purchase Ramadhin was unsuccessful and so was the *taluqdar* in getting the sale set aside. The *taluqdar's* suit was dismissed on the point of limitation Again in 1920 the grandsons of Ramadhin sued to have the sale set aside. One of the sons of Mohammad Ali, Khadim Ali by name, compromised the suit and transferred his share of the property to the present judgment-debtors for a sum of Rs. 1,290. The plaintiff, therefore, in reality derived title from Mohammad Ali who had retained interest in the property in spite of the *taluqdar's* suit. Under the circumstances whatever the conditions may have been between 1874 and 1899 when Mohammad Ali purchased the property, at present the interest in the hands of the judgment-debtors is transferable. The case is similar to that of *Rampher Singh* v. *Ram Khelawan Singh* (2) which was approved of by a Bench of this Court in the case reported as *Muhammad Abdul Karim Khan* v *Niwaz Singh* (1) already referred to. Here two transfers have already been made, to one of which the *taluqdar* was compelled to acquiesce and to the other the *taluqdar* did not object. After such transfers the original condition against alienation cannot be said to exist.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 3 Ind. Cas. 868; 12 O. C. 267.
(2) 2 O. C. 252.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 39 OF 1923.

June 20, 1924.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Graham.

ALKAMA BIBI AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Syed ISTAK HOSSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of—Possession of property in medio—*Scramble for possession*—Bona fide *claim—Receiver, whether may be appointed.*

An order appointing a Receiver will not ordinarily be made at the instance of a plaintiff having merely a shadowy claim, where it has the effect of depriving a defendant of *de facto* possession, since that might cause irreparable wrong. [p. 184, col. 2.]

The main object of appointing a Receiver is to protect the properties pending litigation and to preserve them for the benefit of the party lawfully entitled thereto. In an application for the appointment of a Receiver it is sufficient, therefore, if a *prima facie* title to the property over which the Receiver is sought to be appointed is made out. [p. 184, col. 2; p. 185, col. 1.]

Per *Graham, J.* (*Greaves, J., dubitante*).—Where property is shown to be *in medio*, that is, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is to the common interest of all parties that the Court should prevent a scramble between the parties to obtain possession of the property and where no one appears to be in actual lawful enjoyment of the property and the plaintiff has put forward a *bona fide* claim, no harm can be done to any one by the Court taking possession of the property and preserving it for the benefit of the litigant who may eventually prove successful. [p. 185, col. 1.]

Appeal against an order of the District Judge, Birbhum, dated the 31st October 1923.

Babus *Jyotis Chandra Sircar* and *Haradhone Chatterjee*, for the Appellants.

Dr. *Jadu Nath Kanjilal*, for the Respondents.

JUDGMENT.

Graham, J.—This appeal is directed against an order of the District Judge of Birbhum refusing to appoint a Receiver

pending the disposal of a suit brought by the plaintiffs, now appellants, for the appointment of plaintiff No. 1 as *mutwalli* of a certain *wakf* estate, or in the alternative, for the appointment of both the plaintiffs as *mutwallis*.

The facts, so far as they are material for present purposes, may be shortly stated.

In the year 1304 *B. S.* one Molajim Hossain Khan made a disposition of all his properties for religious and pious purposes, and on the 12th *Falgun* 1304 executed a deed of *wakf* whereby he appointed himself as *mutwalli* for his own lifetime and made provision for succession to the office after his death. His wife Mataharannessa Bibi was to succeed him as *mutwalli*. On the 3rd *Kartik* 1309 *B. S.* Hossian Khan died, his wife having predeceased him on the 28th *Bhadra* of the same year. The *wakafnama* contained a provision to the following effect: "In the absence of my two wives and children the Collector of the District shall be competent to appoint whomsoever of my line (*amar bongsher madhye*) he considers competent and pious as the *mutwalli*," and according to this provision the last *mutwalli* Mostak Hossain Khan was appointed as such.

Mostak Hossain, who succeeded as *mutwalli* on the death of Hossain Khan, died in *Chaitra* 1328 *B. S.* and the dispute then arose which has led to the institution of this suit. The plaintiffs-appellants claim that under the terms of the *wakf* deed, the person who of the settlor's line or family is fit to be appointed as *mutwalli*, should be so appointed. Plaintiff claimed that she is possessed of the necessary qualifications, and in the alternative, asked that both she and the plaintiff No. 2 might be appointed, the plaintiff No. 2 being stated to be an agnatic relation of Molajim Hossain Khan.

It appears that after the death of Mostak Hossain an application was made to the Collector of Birbhum to appoint a *mutwalli* in accordance with the provisions of the *wakfnama*, but the Collector held that he had no jurisdiction and referred the parties to the Civil Court. The plaintiffs thereupon filed their plaint on the 23rd May 1922. The 1st, 2nd and 3rd defendants are the widows of Mostak Hossain and the 4th defendant is a minor, Syed Istak Hossain, grandson of Mostak Hossain, represented by his grandfather, next friend and guardian Syed Hossain Ali.

On the 7th June, 1923, an application was made by the plaintiffs for the appointment of a Receiver and orders were passed *ex parte* appointing as Receiver a Pleader named Moulvi Nurul Absar Objection was subsequently taken on behalf of defendant No. 4 to the appointment and the order was stayed. Eventually on the 31st October, 1922, after hearing the parties the District Judge cancelled the *ex parte* order previously passed and declined to appoint a Receiver. The plaintiffs then filed this appeal.

The sole question is whether in the particular circumstances of this case it is just and convenient that a Receiver should be appointed. The main principles upon which the discretion of the Court should be exercised in making such an appointment are well settled. Such an order will not ordinarily be made at the instance of a plaintiff having merely a shadowy claim where it has the effect of depriving defendant of *de facto* possession, since that might cause irreparable wrong. It appears to be extremely doubtful here, however, whether the property in dispute is in the exclusive possession of any one of the parties. Syed Hossain Ali, the grandfather and guardian of the defendant No. 4, in his petition dated the 16th June 1922 claims to be in possession of the *wakf* estate on behalf of the minor Istak Hossain, but he has not ventured in his affidavit of the 21st July 1922 to affirm that he is in such possession, and the omission is significant. Then the defendant No. 7 Syed Hossain Tahid in a petition filed on the 31st October 1922 also claims to be in possession of the *wakf* estate.

It is by no means clear, therefore, who is in actual possession, and in the meanwhile something like a scramble seems to be going on between those who have claims or fancied claims to the office of *mutwalli*. Such a state of affairs cannot but be prejudicial to the interests of the *wakf* estate. Government Revenue has to be paid rents collected, suits instituted or defended and pious and religious acts performed in accordance with the provisions of the *wakf* deed. None of these things can be done or properly done while a state of confusion prevails. The main object of appointing a Receiver is to protect the properties pending litigation and to preserve them for the benefit of the party lawfully entitled thereto. It is not necessary at the present stage to consider the question whether the plaintiffs

can legally be and ought to be appointed as *mutwallis*. That is a matter which will have to be decided in the suit. In an application for the appointment of a Receiver it is sufficient if a *prima facie* title to the property over which the Receiver is sought to be appointed is made out. Having regard to the terms of the *wakfnama* it can hardly be disputed that a *prima facie* claim has been made out by the plaintiffs. It cannot at all events be said that their claim is a mere pretence. On the contrary it appears to be a *bona fide* claim and that being so, and regard being had to the state of affairs which has been disclosed, the case seems to be a fit one for the appointment of a Receiver. Where property is shown to be *in medio*, *i.e.*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble, and as no one seems to be in actual lawful enjoyment of the property no harm can be done to any one by taking it and preserving it for the benefit of the litigant who may prove successful.

It is to be observed that the learned District Judge, while holding that the necessity or propriety of appointing a Receiver has not been made out to his satisfaction has given no reasons for his conclusion. If he had found that any one of the parties was in exclusive possession of the *wakf* estate and was duly administering it, the position would have been different. On the particular facts of the case it appears to me to be expedient that a Receiver should be appointed. In the result, therefore, the appeal must be allowed, the order of the District Judge set aside, and a Receiver will be appointed, it being left to the discretion of the Court below to select a suitable person for such appointment. The costs of this appeal will abide the result of the suit. The hearing-fee is assessed at two gold *mohurs*.

Greaves, J.—I confess that I felt considerable doubt in the course of the argument addressed to us as to whether the plaintiff putting forward the claim which she puts in this case is entitled to ask the Court in an interlocutory application to appoint a Receiver. Apart from the Rs. 12 a month to which she is entitled by virtue of the *wakfnama* itself and which, it is not suggested to us, is in arrear her interest seems to be merely a claim that she is entitled to a preferential consideration when the Court appoints a *mutwalli*. As I have already stated I felt considerable doubt yesterday as to whether a claim of this nature was sufficient to justify a Court in appointing a Receiver in an interlocutory application and I confess that my doubts are not entirely dispelled. The grounds upon which a Court in England and a Court in this country appoint Receivers are practically the same. Under the Judicature Act of 1873, a Court can make such an appointment where it considers it just and convenient to do so, that is to say, you have the same words as appear in the C. P. C. in this country. I took the opportunity last night and this morning of consulting. "Daniel's Chancery Practice" which deals exhaustively with the appointment of Receivers by a Chancery Court and also "Kerr on Receivers." I have not been able to discover any case in which a Receiver has been appointed in an interlocutory application under circumstances in any way resembling the circumstances of this case, I mean where the interest is of so shadowy a nature as in this case. There always seems to have been some actual interest in the property to be protected to support such an appointment but my learned brother feels that in the circumstances of this case it is desirable that a Receiver should be appointed and as the learned District Judge in the Court below has left the matter in doubt as to whether the *wakf* property is without a custodian or not I think that we are justified under these circumstances in making the appointment simply for the protection of the property. Although still feeling the doubt which I do having regard to the nature of the plaintiff's claim I am not prepared to say that a Receiver should not be appointed in this case and I concur in the order that has been made.

Z. K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

February 19, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge, and Mr. Ameer Ali.

NEKI AND OTHERS—APPELLANTS

versus

CHHAJJU RAM AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109, 110—

Decree of High Court reversed on review—Judgment passed in review set aside by Privy Council—Order dismissing suit—Leave to appeal to Privy Cauncil against previous judgment of High Court—Appeal, whether competent.

A suit was decreed by the Trial Court, but was dismissed in appeal by a Division Bench of the Chief Court of the Punjab on 3rd November 1917. A review of the judgment of the Chief Court was, however, allowed and on 11th December 1918, a different Bench of the same Court decreed the suit. Against the latter order the defendants went up in appeal to the Privy Council where it was held that the Bench who had allowed the application for review was not competent to hear a review and their Lordships made the following order on the appeal:—"The decree of the Chief Court of the Punjab dated 11th December 1918 ought to be set aside, the decree of the Chief Court dated the 3rd November 1917 restored and the suit dismissed with costs throughout." The judgment of the Board was embodied in an Order in Council. Subsequent to this the Chief Court of the Punjab granted leave to the plaintiffs to appeal to the Privy Council against the judgment of the 3rd November 1917, on the ground that the order of the Privy Council merely dealt with the competency of the review application and the legality of the order passed on review:

Held, that the suit having been finally dismissed by the previous Order in Council there was no existing suit in which an appeal to the Privy Council, in any shape or form, could be held to be competent.

Appeal against the judgment and decree of the Lahore High Court (Mr. Justice Harrison and Mr. Justice Zafar Ali), dated the 1st June 1923, reported as 77 Ind. Cas. 869.

Mr. *J. M. Parikh*, for the Appellants.

Sir *George Lowndes* and Mr. *S. McNair*, for the Respondents.

JUDGMENT.

Lord Shaw.—The view of their Lordships has been sufficiently expressed in the course of the discussion.

This is an appeal in what to all intents and purposes is a non-existent suit. By a judgment of the Board, dated the 27th February 1922, their Lordships agreed humbly to report to His Majesty that in "their humble opinion this appeal ought to be allowed, that the decree of the Chief Court of the Punjab, dated the 11th December 1918, ought to be set aside, the decree of the Chief Court, dated the 3rd November 1917, restored, and the suit dismissed with costs throughout." That was not merely the shape of the judgment of this Board; it was embodied as quoted in His Majesty's order in Council, dated the 3rd March 1922. It is quite impossible that any Court in this country or in India can consider such a suit as an existing suit in which any order whatsoever can be made. The suit has been finally dismissed with costs.

When the Court below in granting leave to appeal says that, "The order of the Privy Council merely dealt with the competency of the review application and the legality of the orders passed," their Lordships are not liable to accede to that view, having before them the actual text of the order dismissing the suit with costs. It may be open to the appellants to make such an application as they may deem desirable to this Board to re-consider the judgment from which a citation has already been made. There may be considerations applicable to it which the Board when such an application comes before it, will have to take into a view in considering what are the rights of a person not appearing as a party before the Board to ask for leave to rectify those proceedings by a subsequent application. No pronouncement whatsoever is made upon that, but their Lordships, standing upon the existing order of the Privy Council, are constrained to hold that there is no existing suit in which this appeal in any shape or form can be held to be competent.

The appeal will, therefore, be disallowed with costs.

Z. K. *Appeal disallowed.*

Solicitors for the Appellants.—Mr. *E. Dalgado.*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 145 OF 1924.

May 11, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Musammat KULSUM BIBI—DEFENDANT—APPELLANT

versus

MUHAMMAD ISMAIL AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 118, 233 (k)—Partition proceedings pending in Revenue Court—Suit for partition of residential house, whether maintainable—Jurisdiction of Civil and Revenue Courts.

A Revenue Court has no jurisdiction to partition a residenti l house. It can partition the site occupied by a house along with other land in a village. If in making a partition it is necessary to include in the portion allotted to one co-sharer land occupied by a dwelling house or other building in possession of

another co-sharer, the latter can, under s. 118 of the Land Revenue Act, be allowed to retain the land with the building thereon on condition of his paying a reasonable ground rent to the co-sharer in whose portion the building may be included.

A suit, therefore, for the partition of a residential house is cognizable by a Civil Court and is not barred by virtue of the fact that proceedings are pending in the Revenue Court for a perfect partition of the village in which the house is situated.

First appeal from an order of the District Judge, Ghazipur, dated the 4th September 1924.

Mr. *K. Verma*, for the Appellant.

Mr *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for possession of a certain share by partition of the house in dispute. At the time when the suit was instituted proceedings in the Revenue Court for a perfect partition of the village were pending. One of the pleas taken in the written statement was that the suit in view of the Revenue Court's partition proceedings was not maintainable. The learned Munsif dismissed the suit on the preliminary ground that it was not maintainable. On appeal the learned District Judge has taken a contrary view and has remanded the case.

In our opinion the view taken by the lower Appellate Court is perfectly correct. The subject-matter of dispute in the civil suit is a residential house which is said to have belonged to the ancestor of the parties and in which the plaintiff claimed a defined share. The Revenue Court has no jurisdiction to partition a house, that is to say partition the buildings at all. It can partition the site occupied by a house along with other land in a village. Of course if in making a partition it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in possession of another co-sharer, the latter can under s. 118 of the Land Revenue Act be allowed to retain it (the land) with the buildings thereon on condition of his paying a reasonable ground rent to the co-sharer in whose portion it may be included. It is, therefore, clear that the Revenue Court could not have partitioned the building itself and allotted the house to any particular co-sharer. All that can be done by the Revenue Court in partition proceedings is that if a house is in the occupation of one co-sharer and the site is allotted to another, it would be retained by the occupier of the house on payment of a rent to be fixed. This view is supported by the case of *Multan Singh* v. *Pudhan Man Singh* (1) decided by a Bench of which one of us was a member.

The learned Vakil for the appellant has contended before us that there was an agreement between the parties that the Revenue Court would allot to each co-sharer the house belonging to that co-sharer. There is, however, nothing on the record which supports this contention. There does appear, however, from the partition proceedings, that there was an agreement that the sites of houses belonging to co-sharers would be allotted to the persons in whose possession they were. That, however, is quite a different thing from saying that there was an agreement that the buildings also would be partitioned by the Revenue Court. The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 84 Ind. Cas. 74; 22 A. L. J. 745; (1925) A. I. R. (A.) 854; L. R. 5 A. 244 Rev.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 196 OF 1924.

March 9, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Thakur UMAN SHANKAR SINGH *alias* BACHAN SINGH—DEFENDANT—APPLICANT

versus

Pandit MURLIDHAR—PLAINTIFF—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), ss. 4, 28, 38—High Court Vakil enrolled as Pleader First Grade in Judicial Commissioner's Court, status of—S. 28, applicability of.

The intention of s. 38 of the Legal Practitioners Act is to exempt persons possessed of the qualifications mentioned therein from the provisions of the Act except some provisions enacted by certain sections among which s. 28 is not included. [p. 183, col. 2.]

A person who is enrolled as a Vakil of a High Court does not by being admitted as a Pleader of the First Grade in the Court of the Judicial Commissioner of Oudh cease to be a High Court Vakil. The provisions of s 28 of the Legal Practitioners Act do not apply to the case of such a person. [*ibid.*]

Section 4 of the Legal Practitioners Act merely prescribes the limitations under which a Vakil entered on the roll of a High Court under the Letters Patent constituting such Court can practise. It does not in any manner detract from the status of a Vakil conferred on him by the fact that he has been entered as such on the rolls of a High Court and it is the status which s. 38 of the Act contemplates. [*ibid.*]

Application for revision under s. 25, Provincial Small Cause Courts Act, against

the judgment and decree of the Officiating Subordinte Judge, Kheri, dated the 17th September 1924.

Mr. *Radha Krishna*, for the Applicant.

Mr. *Moti Lal Saksena*, for the Opposite Party.

JUDGMENT.—This is an application in revision under s. 25 of the Provincial Small Causes Courts Act, 1887. It has come before us for decision on a reference made by the learned Judicial Commissioner under his order dated the 22nd January 1925. The opposite party, Pandit Murlidhar, is a Vakil of the High Court of Judicature at Allahabad and was admitted and enrolled as such by that High Court. He was subsequently admitted as a Pleader of the First Grade by this Court under para. 267 (5) of the Oudh Civil Digest. The rules were framed in virtue of the authority conferred on this Court under s. 6 of the Legal Practitioners Act, 1879. His name appears in the roll of the First Grade Pleaders entitled to practise permanently in Oudh but he ordinarily practises in the District Courts of Kheri.

The grounds of the application as stated in it are four in number but only the first ground has been pressed and the rest have been abandoned. That ground is as follows :—

"Because there being no written agreement the suit is not maintainable."

The claim, out of which this application arises, was brought by the opposite party in the Court of Small Causes situate at Kheri for the recovery of Rs. 235 as arrears of fees of the opposite party for the work done by him in his professional capacity in several cases of the applicant. Part of the claim, that is Rs. 120 has been decreed on the ground that it was a reasonable compensation for the work done by the opposite party in a criminal case and a sum of Rs. 105 has been decreed in his favour in respect of fees in several civil cases on the basis of an oral agreement between the opposite party and the applicant. The defence was that the agreement as to the amount of the fees for the services rendered by the opposite party not being in writing was invalid by virtue of the provision of s. 28 of the Legal Practitioners Act 1879.

The Trial Court rejected this defence on the ground that that section did not apply to the opposite party by reason of the provisions of s. 38 of the same Act. The argument raised in the Court below was reiterated before us at the hearing of this application and in support of it a decision of the former Chief Court of the Punjab in the case of *Madan Gopal* v. *Sheo Singh Rai* (1) was cited. With all respect we are not prepared to follow the decision in that case. We think that the view taken by the Court below is correct.

Under para. 267 (5), cl. III of the Oudh Civil Digest the opposite party was admitted as a Pleader of the First Grade in this Court by reason of his being a Vakil of the High Court of Judicature at Allahabad. By being so admitted he did not cease to be a Vakil of that Court. On the contrary, the fact that he was such a Vakil was the *sine qua non* of his admission as a First Grade Pleader. The intention of s. 38 of the Legal Practitioners Act is to exempt persons possessed of the qualifications mentioned therein from the provisions of the Act except such provisions as are enacted by ss. 4, 5, 7, 17, 27, 32 and 36 of the Act. It will be noticed that among these sections s. 28 does not occur. It follows that the opposite party being a Vakil admitted and enrolled by a High Court under the Letters Patent by which that Court is constituted the provisions of s. 28 do not apply to him. The reasoning of the learned Judges of the Punjab Chief Court based on the provisions of s. 4 of the Legal Practitioners Act does not commend itself to us. That section merely prescribes the limitations under which a Vakil entered on the roll of a High Court under the Letters Patent consituting such Court can practise. It does not in any manner detract from his status of a Vakil conferred on him by the fact that he has been entered as such on the roll of the High Court and it is the status which s. 38 contemplates.

For the above reasons we dismiss this application with costs.

Z. K. *Application dismissed.*

(1) 54 P. R. 1881.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 273 OF 1924.

February 19, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

VISHVANATH BHIVA RAUL—PLAINTIFF —APPELLANT

versus

TUKARAM VITHU—DEFENDANT —RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 148—Mortgage—Sale of mortgaged property by mortgagee—Transferee taking with notice of mortgage—Redemption, suit for—Limitation.

A suit by a mortgagor to redeem mortgaged property which has been sold by the mortgagee to a third person, the latter having notice of the plaintiff's mortgage, is governed by Art. 148 and not by Art. 134 of Sch. I to the Limitation Act.

Second appeal from the decision of the Assistant Judge, Poona, in Appeal No. 198 of 1922, reversing a decree of the Subordinate Judge, Baramati, in Civil Suit No. 6 of 1921.

Mr. *G. N. Thakor* (with him Mr. *K. V. Joshi*), for the Appellant.

Mr. *W. B. Pradhan*, for the Respondent.

JUDGMENT.—The plaintiff sued to redeem and recover possession of the plaint land from the defendant. The plaintiff claimed through one Chimabai, who mortgaged the suit property to one Ganu for Rs. 75 on June 2, 1896, with possession. On May 5, 1902, Ganu assigned his mortgage rights to one Yamunabai *kom* Laxman for Rs. 125. Yamunabai sold the property on July 7, 1906, to one Shankar Laxman for Rs. 300. The document purported to be a sale-deed, but contained this clause: "I have given in your custody for keeping them with you the documents that I have regarding the said house." Those documents included the assignment of the mortgage rights given by Ganu to Yamunabai. Shankar, therefore, knew that the owner was only a mortgagee. On September 21, 1907, Shankar sold the plaint property to the present defendant for Rs. 400. That document contained the following clause: "The said property was in the *vahivat* of Yamunabai by right of the assignment deed of May 6, 1902. She sold it to me for Rs. 300 on July 7, 1906, and passed to me a registered sale-deed for it. Before that Yamunabai was in *vahivat* of the said property. Since we purchased it from her it was in our *vahivat* and we have sold it to you." At the end of the document it is stated as follows: "I have given into your custody for keeping them the assignment deed of the said house, the possessory mortgage-deed and the sale-deed passed by Yamunabai."

The defendant sought the protection of Art. 134 of the Indian Limitation Act. The Trial Court said:—

"Where the transferor is a mortgagee and the transferee has notice of that fact, in such a case Art. 134 has no application at all and the suit against the transferee would come within Art. 148 [see *Taramiya* v. *Shibelisahib* (1).] 'When a transferee for value from a mortgagee seeks the protection of Art. 134, he must be a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is not a mortgage but an absolute sale title.'"

Those are the words of Sir Charles Sargent in *Pandu* v. *Vithu* (2). The Judge continued:—

"In other words he must have reasonable grounds for believing, and must believe, that his alienor had the power to convey an absolute interest and not merely the interest of a mortgagee."

Accordingly the Judge passed a redemption decree in favour of the plaintiff. In appeal the Judge said:—

"I am unable to concur in the opinion of the Second Class Subordinate Judge that Art. 134 does not apply where the transferee has notice that his transfer of title is that of a mortgagee and not of an owner."

He relied upon the decision in *Yesu Ramji* v. *Balkrishna Lakshman* (3); but that case was considered in *Pandu* v. *Vithu* (2). In *Keshav* v. *Gafurkhan* (4), also referred to by the Judge, the purchaser only became aware five or six months after his purchase that his transferor was a mortgagee, and the judgment of the High Court must be considered with regard to that fact. As the Judge considered that the defendant had acquired a complete title to the house in suit under Art. 134, and the plaintiff had no right to redeem, the plaintiff's suit was dismissed with costs.

We think on the facts of this case, and especially on the finding of the Appellate Judge, that the defendant had constructive

(1) 57 Ind. Cas. 568; 22 Bom. L. R. 802; 44 B. 614.
(2) 19 B. 140 at p. 144; 10 Ind. Dec. (N. S.) 95.
(3) 15 B. 583; 8 Ind. Dec. (N. S.) 393.
(4) 67 Ind. Cas. 308; 24 Bom. L. R. 319; (1922) A. I. R. (B.) 234; 46 B. 903.

notice of the previous transactions relating to the plaint house, that he cannot take advantage of the provisions of Art. 134 of the Indian Limitation Act. We think the proper view to take of this case is, that, in spite of the sale-deed, first Shankar and then defendant, were transferees of the mortgagee's rights. In that case the decision of this Court in *Taramiya* v. *Shibelisaheb* (1) will apply, and the plaintiff will be entitled to redeem the property from the possession of the defendant.

We, therefore, allow the appeal and restore the decree of the Trial Court. Six months are allowed to the plaintiff for redemption, to run from the time the proceedings reach the Trial Court.

The plaintiff will be entitled to his costs in this Court and in the Court below.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2065 TO 2071 OF 1922.

February 5, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

RAM SUNDAR DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SATINDRA MOHAN TAGORE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 7, 109—Enhancement of rent—Customary rate—Jurisdiction to settle rent—Second appeal.

Before a Court can take action under s. 7 (2), Bengal Tenancy Act, it must be definitely found that no customary rate of rent exists. The mere fact that the landlord fails to prove the customary rate does not entitle the Court to proceed under that sub-section. [p. 190, col. 2.]

Jogesh Chandra Roy v. *Izzat Ali*, 85 Ind. Cas. 97; 40 C. L. J. 585; (1925) A. I. R. (C.) 454, relied on.

Section 109, Bengal Tenancy Act, does not apply where the question relates to the competency of a Court to settle rent. A second appeal lies against a decision in such a case. [p. 191, col. 1.]

Appeals against the decrees of the Special Judge, Tipperah, dated the 29th of April 1922, reversing those of the Assistant Settlement Officer, Chandpur, dated the 29th of September 1920.

Messrs. *Mohendra Nath Roy* and *Upendra Kumar Roy*, for the Appellants.

Babu *Hiralal Chakravarti*, for the Respondents.

JUDGMENT.—These seven appeals are by the tenants. Appeals Nos. 2065, 2066 and 2067 raise questions similar to those that were urged in Second Appeal No. 287 of 1922. In view of our judgment in that case these appeals fail and are dismissed with costs, one gold *mohur* in each case.

In the next group of Appeals (Nos. 2068 to 2071) the question raised is that the learned Special Judge was not legally justified in enhancing the rent of the tenants under s. 7, Bengal Tenancy Act. The finding of the learned Judge is that the plaintiff has failed to prove the existence of a customary rate payable by persons holding similar tenures in the vicinity, and hence the plaintiff cannot claim any enhancement under the provisions of sub-s. (1) of s. 7. He must, therefore, make out a case for enhancement which appears to be fair and equitable. This observation shows that the plaintiff having failed to establish the existence of a customary rate the Court is to proceed under sub-s. (2) of s. 7 to determine the limit upto which the enhancement is judged to be fair and equitable by the Court. This view is wrong in law as has been held in the case of *Jogesh Chandra Roy* v. *Izzat Ali* (1) following the case of *Midnapore Zemindari Co.* v. *Sridhar Mahata* (2). Before a Court can take action under sub-s. (2) it must be definitely found that no customary rate exists. The finding that the plaintiff has failed to prove the customary rate is not sufficient to give jurisdiction to the Court to proceed to determine to what extent the rent should be enhanced under cl. (2). We accordingly think that the judgment of the lower Appellate Court is wrong and on this point it must be set aside. Several other questions in connection with the mode of enhancement adopted by the learned Judge have been raised and in view of what we hold on the first question, namely, that on the finding arrived at by the learned Judge he is not entitled to enhance the rent of the appellant, the other questions do not arise and need not be considered.

The respondent landlord urges by way of a preliminary objection that in cases like the present no appeals lie presumably under s. 109-A. That section bars an appeal to

(1) 85 Ind. Cas. 97; 40 C. L. J. 585; (1925) A. I. R. (C.) 454.

(2) 67 Ind. Cas. 775; 49 C. 866; 36 C. L. J. 96; (1922) A. I. R. (C.) 152.

this Court against a decision settling rent. In Second Appeal No. 287 of 1922 we have held that that portion of the decision of the lower Appellate Court which fixes the rent payable by the tenant is not appealable; and if the question raised in these appeals was only as to the amount of the rent fixed by the Court below the appeals would have been incompetent. But in these cases the question raised is beyond the purview of cl. (3) of s. 109, Bengal Tenancy Act. The question raised relates to the competency of the Court to settle rent which is very different from a decision setting the rent. We think that the appeals lie in these cases; and this question has always been considered in second appeals as will be apparent from the ruling already referred to.

The result is that Second Appeals Nos. 2068 to 2071 of 1922 are allowed, the decrees of the Special Judge allowing enhanced rent in cases of *khatians* involved in these appeals will be set aside with costs one gold *mohur* in each case.

Z. K. *Appeals allowed in pt2.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 550 OF 1923.

February 19, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

KESHAV KRISHNA KULKARNI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHANKAR MAHADEV KULKARNI—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 18—Easement—Customary right, proof of—Trees overhanging neighbour's land—Right, whether can be acquired.

An easement permitting trees belonging to the dominant owner to overhang the servient tenement cannot be acquired by prescription, nor can such a right be proved to exist by local custom under s. 18 of the Easements Act. [p. 193, col. 1.]

A customary right must be both ancient and invariable. The mere fact that a few persons choose to tolerate their neighbour's palms overhanging their houses would not establish a custom binding on all the others. [*ibid.*]

Second appeal from the decision of the First Class Subordinate Judge at Ratnagiri, in Appeal No. 45 of 1922, confirming a decree of the Subordinate Judge at Malvan, in Suit No. 177 of 1919.

Mr. *A. G. Desai*, for the Appellants.

Mr. *S. Y. Abhyankar*, for the Respondent.

JUDGMENT.—The plaintiff sued to obtain a permanent injunction ordering the defendants to see that the two palm trees and the jack-fruit tree growing in the defendants' land, or their leaves or any portion of them did not overhang either the plaintiff's house or land, and to obtain an order that these trees should be cut down by the defendants at their expense and that in default the plaintiff should be allowed to do so at the expense of the defendants, also for damages and costs.

The defendants raised many contentions in their written statement. The principal issues raised on the pleadings were :—

(1) Is the plaintiff entitled to have the defendants' palms and jack-tree (Nos. 1 to 3 in the map-Ex. 18) removed?

(3) Is the plaintiff estopped from asking for the removal of the palms and jack-tree?

(4) Is the suit barred by limitation?

(5) Have the defendants any and what rights of easement with regard to the palms?

The Trial Judge held that the plaintiff was entitled to have such portions of defendants' palm and jack-fruit tree cut as overhung his property; that the plaintiff was not estopped from asking for the removal of the palms, and that as to the jack-fruit tree the question of estoppel did not arise; that the suit was not barred by limitation; and that the defendants had no rights of easement whatever. Accordingly he directed the defendants to remove and cut off those portions of the two palms and one jack-fruit tree which overhung plaintiff's land, failing which plaintiff was at liberty to cut them down at defendants' costs through Court He awarded no damages to plaintiff but allowed proportionate costs against defendants.

In appeal the principal issues were :—

(3) Whether issue No. 5 framed in the lower Court is not comprehensive and does not include the right of customary easement claimed by the defendants?

(4) Whether the easements claimed by the defendants are proved?

(5) Whether plaintiff is entitled to have the two palms and one jack-tree cut so far as they overhung plaintiff's site and house?

The Judge held on issue No. 3 that issue No. 5 in the Trial Court was sufficiently comprehensive so as to include the custom-

ary easement set up by defendants. On issue No. 4 the Judge held that the easements claimed by the defendants were not proved, and on issue No. 5, that the plaintiff was entitled to have the two palms and one jack-fruit tree cut so far as they overhung plaintiff's site and house.

It has been argued in appeal before us that the defendant was entitled to an easement by local custom by which his neighbour was bound to suffer his land to be overhung by the defendant's trees.

In *Hari Krishna Joshi* v. *Shankar Vithal* (1), this Court decided that the private nuisance caused by the overhanging boughs belonging to the trees of one neighbour to the owner of the land over which the boughs were overhanging did not create a "right" within the definition of 'easement' in the Indian Easements Act, nor did the convenience to the owner of the tree, always changing in extent and position of space, become at any time so determinate that it could by any length of time be held to be enjoyed as "of right", a matter essential under s. 15 of that Act. In the judgment of Mr. Justice Jardine the whole law on the subject was carefully considered. The question whether such an easement was recognised by the rules of Hindu Jurisprudence was discussed, and the principles applied in such cases by the Courts in England explained. There is no reason why we should differ from the conclusion arrived at in that judgment, that there can be no such easement as is claimed in this case which can be acquired by prescription.

It is contended, however, that although such an easement cannot be acquired by prescription, it can be acquired by local custom. The same question arose in *Vishnu Jagannath Joshi* v. *Vasudeo Raghunath Oka* (2), where the plaintiff claimed the same relief as the plaintiff in this suit. Before the Appeal Court it was argued that the defendants should have been allowed to prove the alleged custom as to his right to retain the trees overhanging the plaintiff's land. Shah, J., said (page 828*) :—

"As to the first point I have no hesitation in disallowing the appellant's contention. It is clear on the authorities, and for the purpose of this point it is not disputed before us, that the plaintiff has the right to cut off those portions of the trees which overhang his land. This right is recognized in *Lemmon* v. *Webb* (3); *Hari Krishna Joshi* v. *Shankar Vithal* (1), and *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (4)...As regards the alleged custom, the defendant described the custom in the written statement in these terms: 'No owner of plantation can make a complaint against another owner even if these trees grow in any direction in the air. There is a *vahivat* (custom) to this effect, in our province continuing for over thousands of years'. When the issues were framed, there was no specific issue raised as to this custom. After the hearing of the suit commenced, an application was made on November 29, 1915, in which the defendant requested the Court to raise the issue as to custom in these terms: 'Does defendant prove that there is a custom in the village not to complain against overhanging of cocoanut trees over every neighbour's land?' The Trial Court disallowed the application of the defendant for this issue and the evidence relating to it. It is urged before us that the Trial Court should have allowed the defendant an opportunity of proving this custom. Having regard to the terms of the issue it seems to me that the Trial Court was right in disallowing the defendant's application. As stated in the written statement and as indicated in the proposed issue there is a custom in the village not to complain against the overhanging of cocoanut trees over neighbour's lands. It seems to me that such a custom would not be reasonable and cannot be pleaded. In effect it amounts to a plea that a person whose right to land is infringed cannot sue in respect of that infringement. Apart from the form in which the alleged custom is stated by the defendant it seems to me that in substance it is indefinite and vague; and, in my opinion, it will serve no useful purpose to direct at this stage an inquiry as to custom, which, as stated by the defendant, does not appear to be either reasonable or definite. In this view of the case it is not necessary to consider Mr. Gokhale's argument on behalf of the respondent that there could be no customary easement in respect of the right to overhang the trees on a neighbour's land as such a right is not an easement within the meaning of the definition of 'easement'

(1) 19 B. 420; 10 Ind. Dec. (N. S.) 284.
(2) 47 Ind. Cas. 629; 20 Bom. L. R. 826; 43 B. 164.
*Page of 20 Bom. L. R.—[*Ed.*]

(3) (1895) A. C. 1; 64 L. J. Ch. 205; 11 R. 116; 71 L. T. 647; 59 J. P. 564.
(4) 31 C. 944; 8 C. W. N. 710.

under the Indian Easements Act. I express no opinion on the general question as to whether the right to retain the trees overhanging the neighbour's land is a customary easement within the meaning of s. 18 of the Indian Easements Act."

Although *Hari Krishna Joshi* v. *Shankar Vithal* (1), was referred to on the question whether the plaintiff had a right to cut off those portions of the trees which overhung his land, the learned Judges avoided deciding whether there can be such a customary easement within the meaning of s. 18 of the Indian Easements Act as was claimed by the defendants in the case before them. But it seems to us that the decision in *Hari Krishna Joshi* v. *Shankar Vithal* (1) is sufficient authority for deciding that there can be no such easement, as is claimed in this case within the meaning of that term in the Indian Easements Act, and if there can be no such easement, then such a right cannot be proved to exist by local custom under s. 18 of the Indian Easements Act. We think the lower Appellate Judge was right in saying that the custom set up was too vague and indefinite. It was neither ancient nor invariable. Besides if a few persons chose to tolerate their neighbour's palms overhanging their houses, such act could not establish a custom binding on all the others.

The result must be that the appeal is dismissed and the decree passed by lower Appellate Court confirmed.

The appellant objected to the terms of the decree, but it is difficult to see how the plaintiff's right could be protected by any other order. The plaintiff is entitled to cut off such portion of his neighbour's trees as overhang his land, and the decree allows the defendant to cut off those portions of the two palms and one jack-fruit tree which overhang the plaintiffs' land before the plaintiff exercises his own rights in the matter.

Respondent No. 1 will get his costs of the appeal.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 143 OF 1923.

May 13, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

SIR WASIF ALI MIRZA, *Nawab Bahadur* OF MURSHIDABAD—DEFENDANT—APPELLANT

versus

SARADINDU NARAIN RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estates Partition Act (V B. C. of 1897), ss. 94, 119—Limitation Act (IX of 1908), Sch. I, Art. 14—Partition—Order of Collector refusing to give possession, nature of—Suit to recover possession, whether barred—Limitation.

Section 94 of the Estates Partition Act contemplates the procedure to be followed by the Collector in giving possession of separate estates allotted to several proprietors after a proposed partition has been confirmed by higher authorities. [p. 194, col. 2.]

An order of the Collector refusing to give possession of a disputed *chuck* to a party to whom it has been allotted does not fall within the purview of s. 94 of the Estates Partition Act. [*ibid.*]

There is nothing in law which takes away the ordinary right of a person to institute a suit in a Civil Court to recover what was allotted to him on partition. [*ibid.*]

In order to fall within the purview of Art. 14 of Sch. I to the Limitation Act, an order must be one which the Officer is empowered under the law to pass and which would be effective unless set aside, and which is an order which under the ordinary law is liable to be set aside by a suit in the Civil Court. [*ibid.*]

Appeal against a decree of the District Judge, Murshidabad, dated the 12th August 1922, affirming that of the Munsif, First Court, Kandi, dated the 10th June 1921.

Mr. *Amarendra Nath Bose* and Babu *Sures Chandra Mukherjee*, for the Appellant.

Mr. *Gunada Charan Sen* (for Babu *Jogesh Chandra Roy*) and Babu *Anilendra Nath Roy Chowdhury*, for the Respondents.

JUDGMENT.—This appeal is by the defendant. It arises out of a suit brought for declaration of the plaintiffs' title to the *chuck* in suit and for recovery of possession thereof. Both the Courts below have found against the defendant and in this appeal three points have been raised. The first is that on a proper construction of the *solenama* between the parties it ought to have been held that this land was outside the partition and was the property of the defendant. The *chuck* in question appears

to be resumed *chakran* land appertaining to *Mouza* Bistupur, a *mouza* held separately by the defendant. But in the finally published Record of Rights it was recorded as a part of the joint *mouzas*. In 1910 the defendant applied to the Collector for partition of the *mouzas* held joint under *Touzis* Nos. 253 and 254 under the Estates Partition Act. In 1915 a *solenama* was filed settling the terms of the partition between the parties and under that partition the *mouza* containing the *chuck* in suit fell to the plaintiffs. The *solenama* was in these terms: "The *chucks* within the *mouzas* which the opposite party shall get under the terms of this *solenama*, as appertaining to *Touzi* No. 254 definitely included within *Touzi* No. 253 under the Survey and Settlement of the Record of Rights shall remain included within *Touzi* No. 253 and the petitioner, the Nawab Bahadur of Murshidabad, shall remain in the ownership and possession thereof as before and the *chucks* within the *mouzas*, which the petitioner Nawab Bahadur of Murshidabad is to get as appertaining to *Touzi* No. 253, which have been definitely included by the Survey and Settlement in the Record of Rights in *Touzi* No. 254, shall be owned and possessed by the opposite party and they shall remain included within *Touzi* No. 254." On this the plaintiffs' case is that whatever may be the origin of this *chuck*, it being included in Settlement and Record of Rights in *Mouzas* Santoshpur and Mahadia, it will fall into their share even though it strictly belongs as *chakran* land to *Mouza* Bistupur, a *mouza* even before partition solely possessed by the Nawab Bahadur of Murshidabad. We hold that this is the proper construction of the document. It is perfectly clear for the purpose of partition that the parties recognized the Settlement and Record of Rights as final as to the division of land and that may result in a *chuck* appertaining to a *mouza*, but situated in another, changing ownership by virtue of the partition. We find this point, therefore, against the appellant.

The second point is that the present suit is barred under s. 119 of the Estates Partition Act (V of 1897). It is argued that the order is based on the fact that in 1916, after the defendant secured a rent decree against the tenants inspite of the plaintiffs' objection, the plaintiffs applied to the Collector to give effect to the partition made by him and to give them possession of the disputed *chuck*. The Collector, however, refused the plaintiffs' application. It is argued that this order of the Collector was passed under s. 94 of the Estates Partition Act and, therefore, under s. 119 no suit lies to challenge it. In our judgment the order was not passed under s. 94 which contemplates the procedure to be followed by the Collector in giving possession of separate estates allotted to several proprietors after the proposed partition has been confirmed by higher authorities. It is difficult to discover under what provision of the law the order of the Collector was passed, because the partition proceedings came to an end in 1915. In 1916 the plaintiffs went to the Collector as the officer who had made the partition and asked for possession and for giving effect to the partition. There is nothing in law which takes away the ordinary right of a person to institute a suit in the Civil Court to recover what was allotted to him on partition.

The third point urged is that the suit is barred under Art. 14 of the Limitation Act. The order of the Collector was passed in 1915 and the present suit having been instituted in 1921, it is contended that the suit is barred as being brought more than one year after the order of the Collector. This contention also is not sound. The order under Art. 14 must be such an order which the officer is empowered under the law to pass and which would be effective unless set aside, and which further is an order which under the ordinary law is liable to be set aside by a suit in the Civil Court. Reference in this connection may be made to the cases of *Maqbul Ahmad* v. *Hara Gobinda Kalal* (1) and *Balvant Ram Chandra* v. *Secretary of State for India* (2). The learned Advocate for the appellant is not consistent in arguing this point for he originally contended that the order of the Collector was not assailable in the Civil Court. As we have observed the order passed by the Collector is not under any special provision of the law and is not such an order which cannot be questioned in a Civil Court.

All the points having failed, this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 8 C. L. J. 470.
(2) 29 B. 480; 7 Bom. L. R. 497.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDERS NOS. 254 AND 255 OF 1924.

May 13, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

SADHO SARAN PANDE—APPELLANT

versus

Musammat SUBHADRA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, r. 2—Execution of decree—Certification, application for, by judgment-debtor, dismissal of—Application by decree-holder, whether maintainable—Res judicata—*Joint decree—Decree-holder, one, whether can certify satisfaction of entire decree.*

Where an application made by a judgment-debtor under para. 2 of r. 2 of O. XXI of the C. P. C. for certification of a payment made by him to the decree-holder in satisfaction of the decree is dismissed, there is nothing to prevent the decree-holder himself from certifying the payment to the Court under para. 1 of r. 2 of O. XXI. The order dismissing the judgment-debtor's application does not operate as *res judicata* in such a case. [p. 195, col. 2.]

It is not open to one of two joint holders of a decree to certify satisfaction of the whole decree so as to bind the other decree-holder. But a joint decree-holder may certify satisfaction in respect of his own interest in the decree. [p. 195, col. 2; p. 195, col. 1.]

Tamman Singh v. *Lachhmin Kunwari*, 26 A. 318 and *Umrao Beg* v. *Mukhtar Beg*, 74 Ind. Cas. 687; 45 A. 401; 21 A. L. J. 308; (1923) A. I. R. (A.) 494, referred to.

IN M. A. No. 254 OF 1924.

Appeal from an order of the District Judge, Saran, dated the 25th August 1924, reversing that of the Munsif, Chapra, dated the 30th June 1924.

IN M. A. No. 255 OF 1924.

Appeal from an order of the District Judge, Saran, dated the 25th August 1924, confirming that of the Munsif, Chapra, dated the 10th May 1924.

Mr. *Sivanandan Rai*, for the Appellant in both.

Messrs. *Hardeshwar Prasad Sinha* and *Rajeshwar Prasad*, for the Respondents in both.

JUDGMENT.

M. A. No. 254 OF 1924.

Das, J.—This appeal is directed against the order of the learned District Judge of Saran, dated the 25th August 1924, by which he refused an application by one of the decree-holders under the provision of O. XXI, r. 2, para. 1 of the C. P. C.

Sona Kuer and Subhadra Koer recovered a decree for costs against the appellant. The decree-holders took out execution. An application was thereupon presented on behalf of the judgment-debtor apparently under the provision of O. XXI, r. 2, para. 2 of the Code. He alleged that he had paid the entire decretal amount to Sona Kuer and he applied that the payment be certified. His application was supported by a petition of Sona Koer; but it appears that the Court of first instance thought that the application was not a *bona fide* one and dismissed it on the 10th of May 1924. On the 5th June 1924 the judgment-debtor preferred an appeal to the Court of the District Judge of Saran. On the 28th June 1924 Sona Koer herself presented an application which has given rise to these proceedings by which she certified the payment alleged to have been made to her and asked the Court to record the payment. She gave evidence in support of her application and the learned Munsif accepting her story allowed her petition and dismissed the execution case on full satisfaction. Thereupon Subhadra Koer appealed to the District Judge of Saran, and the learned Judge has taken the view first, that the order of the 10th May 1924 operated as *res judicata* thereby putting an effectual bar on the right of the Court to give any effective relief to the judgment-debtor, and secondly that it was not open to a joint decree-holder to give a valid discharge to the judgment-debtor. In these circumstances he allowed the appeal and dismissed the application of Sonar Koer. The judgment-debtor being the party aggrieved, now appeals to this Court.

In my opinion the order of the 10th May 1924 does not operate as *res judicata*. That order was passed on the application of the judgment-debtor apparently under O. XXI, r. 2, para. 2 of the C. P. C. There was nothing to prevent the decree-holders themselves from certifying the payment to the Court and this is exactly what was done by Sonar Koer on the 28th June 1924.

In regard to the other question raised by the learned District Judge, I entirely agree with his view that it is not open to one of two joint holders of a decree to certify satisfaction of the whole decree so as to bind the other decree-holder. It is not necessary for me to deal with this point at length; it is sufficient for me to refer to *Tamman Singh* v. *Lachhmin Kunwari* (1) and *Umrao Beg* v. *Mukhtar Beg* (2).

(1) 26 A. 318.

(2) 74 Ind. Cas. 687; 45 A. 401; 21 A. L. J. 308; (1923) A. I. R. (A.) 491.

But at the same time I am of opinion that a joint decree-holder may certify satisfaction in respect of his own interest therein. This point is not dealt with in the judgment of the lower Appellate Court. There is no injustice in passing an order of this nature as Sona Kuer is bound by her own admission that she has received the entire decretal amount. Subhadra Koer is only entitled to her share of the decretal amount and she is entitled to execute her decree to that extent. There is no reason to put her in a better position than that. This view is supported by the decisions to which I have referred.

The result is that we vary the order passed by the Court below by directing that the payment made to Sona Kuer be recorded and that Subhadra Koer be allowed to execute the decree to the extent of her half share therein.

There will be no order for costs.

M. A. No. 255 of 1924.

The appellant does not desire to proceed with this appeal which is dismissed.

Adami, J.—I agree.

Z. K. *Order varied in Appeal No. 254.*
Appeal No. 255 dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 255 OF 1924.

February 27, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

KISAN TUKARAM TAKLE—DEFENDANT—APPELLANT

versus

BAPU TUKARAM GHADLING—PLAINTIFF—RESPONDENT.

Hindu Law--Succession—Daughters, whether take as tenants-in-common or joint tenants—Survivorship.

Under the Hindu Law applicable in the Bombay Presidency daughters inheriting from their father take an absolute interest, and if there is no division, they take as tenants-in-common and not as joint tenants. There is no question of survivorship in such a case.

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 22 of 1923, reversing that of the Subordinate Judge at Jamkhed, in Civil Suit No. 144 of 1921.

Mr. *Y. N. Nadkarni*, for the Appellants.

Mr. *G. P. Murdeshwar*, for the Respondent.

JUDGMENT.—We think this case is governed by the decision in *Vithappa Kasha Hegde* v. *Savitri Janap Bhatta* (1). Daughters under the Hindu Law inheriting from their father take an absolute interest, and if there is no division, they take as tenants in-common and not as joint tenants. There was, therefore, no question in this case of taking by survivorship. The appeal is dismissed with costs.

Z. K. *Appeal dismissed*

(1) 7 Ind. Cas. 445; 34 B. 510; 12 Bom. L. R. 487.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 375 OF 1923.

April 6, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

SHYAM BALLAV SAHA *alias* SHYAMLAL SAHA—DECREE-HOLDER—APPELLANT

versus

BROJENDRA LAL PODDAR AND ON HIS DEATH HIS HEIRESS HIS MOTHER REBATI SUNDARI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 95—Execution of decree—Auction sale—Delivery of possession to auction-purchaser, whether proceeding in execution of decree—Order confirming possession, whether can be set aside.

The proceeding relating to delivery of possession to an auction-purchaser, whether he be a stranger or the decree-holder, is not a proceeding in execution of a decree and any question arising in such a proceeding is not a question relating to the execution, satisfaction or discharge of the decree within the meaning of s. 47, C. P. C. [p. 147, col. 1.]

Sasibhushan Mookerjee v. *Radhanath Bose*, 25 Ind. Cas. 267; 20 C. L. J. 433; 19 C. W. N. 835, relied on.

Where possession has once been delivered to the auction-purchaser, the order confirming delivery of possession cannot be set aside on the ground that the application for delivery of possession was made beyond the period of limitation prescribed therefor. [*ibid.*]

Appeal against an order of the Subordinate Judge, Second Court, Tipperah, dated the 12th June 1923.

Mr. *B. Bhagirath Chandra Das*, for the Appellant.

JUDGMENT.—In this case the sale of the property in dispute was confirmed on the 26th March 1918 and the application for delivery of possession was made on the 20th December 1922. Possession was delivered on the 27th January 1923 and on the 20th February 1923 the Court re-

ceived the *dakhalnama* and dismissed the execution case presumably on satisfaction. On the 26th February 1923 the judgment-debtors filed an application in which they prayed that the present application for execution of decree on the ground of limitation and illegality be rejected and possession be not "confirmed." The Court finding that the application for delivery of possession was made three years after the sale became absolute held that the application for delivery of possession was barred under Art. 180 of the Limitation Act and made the following order: "The order of delivery of possession is set aside". The decree-holder who is the auction-purchaser has appealed and the first ground taken by him is that the application made by the respondent was incompetent inasmuch as the Court had no longer any seisin of the execution case and it could not interfere with the order confirming delivery of possession because it was not an order in execution within the meaning of s. 47, C. P. C We think that this contention ought to prevail. The proceeding relating to delivery of possession to the auction-purchaser whether he be a stranger or the decree-holder is not a proceeding in execution of a decree and any question arising in such a proceeding is not a question relating to execution, satisfaction or discharge of the decree within the meaning of s. 47, C. P. C.: *Sasibhushan Mookerjee* v. *Radhanath Bose* (1). The respondent has not appeared before us and we have not the advantage of having the case argued by him. But it appears from the authorities that there can be no doubt that s. 47 is inapplicable to the present case. It may by suggested that the order confirming delivery of possession may be reviewed by means of an application under O. XLVII, C. P. C. But the present application is not one under s. 47 and we cannot consider it as such.

The result is that this appeal is allowed and the order passed by the Court below is set aside. The appellant is entitled to the costs of this appeal. We assess the hearing fee at two gold *mohurs*.

Z. K. *Appeal allowed.*

(1) 25 Ind. Cas. 267; 20 C. L. J. 433; 19 C. W. N. 835.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 700 OF 1925.

February 23, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

SHRIPAD DATTATRAYA KAMAT—PLAINTIFF—APPELLANT

versus

VITHAL VASUDEVSHET PARKER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Widow, whether can adopt husband's brother.

Under the Hindu Law applicable in the Bombay Presidency, a widow can validly adopt her husband's brother. [p. 198, col. 2.]

Case-law referred to.

Second appeal from the decision of the District Judge at Ratnagiri, in Appeal No. 136 of 1923, rejecting an appeal from the decree of the Subordinate Judge at Deogad, in Civil Suit No. 168 of 1921.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *G. B. Chitale*, for the Respondents.

JUDGMENT.—This was a suit to recover money on a mortgage by sale of the mortgage property. The mortgage was admittedly passed to one Damaji Raghunath. After Damaji's death his widow Anandibai adopted Dattatraya. On Dattatraya's death his widow adopted the plaintiff, the brother of Dattatraya. The defendents disputed the fact of both adoptions, and also contended that Dattatraya being plaintiff's brother, plaintiff could not validly be adopted by Dattatraya's widow. The adoption was held proved but the plaintiff's suit was dismissed on the ground that the 'brother' was expressly mentioned as a person who could not be adopted in the Dattaka Mimansa, s. V, cls. 16 to 19. The appeal to the District Judge was summarily dismissed for the same reason. It is unfortunate that neither of the learned Judges in the Courts below considered the series of Bombay authorities on this question.

In *Mallappa Parappa* v. *Gangava Gangappa* (1) it was held that the adoption of the father's first cousin was not invalid under Hindu Law. Mr. Justice Shah at page 216* said :—

"There is nothing in the Mitakshara or the Vyavahara Mayukha expressly bearing on this point. I mean there is no express prohibition to adopt the father's first or distant cousin. As to the opinion expressed by Nanda Pandita in the Dattaka Mimansa, s. V, cl. 17 relating to the paternal uncle,

(1) 49 Ind. Cas. 517; 43 B. 209; 21 Bom. L. R. 17.

*Page of 43 B.—[*Ed.*]

I am by no means clear that the word used there for paternal uncle, *viz.*, *pitrivya* means anything more than father's brother (*piturbhrata*) but assuming that it includes an elderly relation in the position of the first cousin of the father, it is clear that the opinions expressed by Nanda Pandita in cls. 16 to 20 have been held in a series of decisions of this Court ending with *Gajanan Balkrishna* v. *Kashinath Narayan* (2) to be recommendatory and not mandatory except as to the three specific cases of daughter's son, sister's son, and mother's sister's son as regards the three regenerate classes."

In *Yamnava Govind Appaji* v. *Laxman Bhimrao* (3), Sir Narayan Chandavarkar expressed his conclusion as follows (page 535*):—

"Now, in the present case we have the light thrown upon the placita referred to by other placita in the Dattaka Mamansa. In s. 2, placita 107 and 108, Nanda Pandita, after discussing among other questions the question who is eligible for adoption, clinches the matter by citing the authority of Cakala who says: 'Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a *sapinda* relation particularly: or also next to him, one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter's son, a sister's son and the son of the mother's sister.' And then in placitum 108, Nanda Pandita draws his conclusion: 'By this it is clearly established that the expression 'sister's son, is illustrative of the daughter's son, and mothers's sister's son, and this is proper, for prohibited connection is common to all three.' 'Prohibited connection' here means what is called '*virudha sambandha*.' Nanda Pandita in clear terms tells us that the words 'sister's son, stand for the sister's son and also for the daughter's son and mother's sister's son and the implication is that it does not extend to any other son. Where a general rule is prescribed and an exception is made to it, the latter must be confined to the cases specified as falling within the exception...If that is so, then it is a reasonable inference to draw from the whole of the Dittaka Mimansa that Nanda Pandita intended that anybody could be adopted so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister's son, or the daughter's son, or the mother's sister's son."

This decision was followed in *Ramkrishna* v. *Chimnaji* (4), and *Gajanan Balkrishna* v. *Kashinath Narayan* (2). And if we were to hold in the face of those decisions that the adoption of the husband's brother was invalid, we should be going contrary to the opinion expressed by so many of the Judges of this Court in the cases we have referred to.

But the question appears to have been conclusively settled by the decision of the Privy Council in *Puttu Lal* v. *Parbati Kunwar* (5) where it was held that a Hindu widow making an adoption by virtue of her deceased husband's authority could validly adopt her brother's son. Reference was made to the decision of Mr. Justice Banerji in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (6) where it was pointed out that on this question as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, Nanda Pandita in the Dattaka Mimansa extended to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension which was not based upon the authority of any of the Smrities or institutes of sages, and their Lordships said (page 555*):—

"As Banerji, J., further pointed out in the same case the extension of the rule by Nanda Pandita is not supported by any text of the 'Dattaka Chandrika,' or by any of the texts of the sages Saunaka and Sakala from which most of the rules of the 'Dattaka Mimansa' were deduced. It has not been shown to their Lordships that the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least, so far as adoptions by widows to their deceased husbands are concerned."

We allow the appeal and pass a decree for the plaintiff for Rs. 350, and costs throughout, and interest on Rs. 200 at 6 per cent. In default of paying the decretal

(2) 28 Ind. Cas. 978; 39 B 410 at p. 419; 17 Bom. L. R. 372.

(3) 16 Ind. Cas. 180; 36 B. 533; 14 Bom. L. R. 543.

*Page of 36 B.—[*Ed.*]

(4) 21 Ind. Cas. 34; 15 Bom. L. R. 824.

(5) 29 Ind. Cas. 617; 17 Bom L. R. 549; 19 C. W. N. 841; 13 A. L. J. 721; 18 M. L. T. 61; 29 M. L. J 63; 22 C L. J. 190; 37 A. 359; 2 L. W. 881; 42 I. A. 155; (1915) M. W N. 514 (P. C.).

(6) 27 A. 417 at p. 433; A. W. N. (1905) 20; 2 A. L. J. 36.

*Page of 17 Bom. L. R.—[*Ed.*]

amount within 6 months of the proceedings reaching the lower Court, the plaintiff to be at liberty to apply for a final decree for sale.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1204 OF 1924.

December 1, 1924.

Present:—Mr. Justice Martineau.

PIR MOHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GULAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Shamlat *land*—*Co-sharer in possession setting up adverse possession*—*Joint possession, decree for, whether can be passed.*

Where a co-sharer in possession of a portion of the *shamlat* land sets up a case of adverse possession the other co-sharers are entitled to a decree for joint possession of the land.

Second appeal from a decree of the District Judge, Lyallpur, dated the 6th February 1924.

Mr. *J. L. Kapur* for Mr. *Mukand Lal Puri*, for the Appellants.

Mr. *Tirath Ram*, for the Respondents.

JUDGMENT.—The plaintiffs sued for possession of a site in village *abadi* alleging that they were its owners and that the defendants had dispossessed them in May 1922. The First Court gave them a decree, but the District Judge on appeal dismissed the suit, finding that the land was village common land and that the plaintiffs were not its exclusive owners. The plaintiffs have filed a second appeal.

The finding on the question of title cannot be challenged, but there is force in the argument advanced on behalf of the appellants that they should be given a decree for joint possession. The land is vacant and the plaintiffs, who are co-sharers in the *shamlat*, are entitled to use the land as much as the defendants. The latter pleaded that they had been in adverse possession of the land for a long time, and in view of that plea, I think it would be proper to give the appellants joint possession. I accept the appeal, set aside the lower Appellate Court's decree, and give the plaintiffs a decree for joint possession with the defendants of the land in suit. The parties will pay their own costs in all the Courts.

Z. K. *Appeal accepted*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 336 OF 1923.

March 8, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

KATHU JAIRAM GUJAR—DEFENDANT—APPELLANT

versus

VISHVANATH GANESH JAVADEKAR—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 24—Pleader and client—Agreement to pay money and to deliver portion of property in dispute to Pleader in case of success, legality of—Public policy—Consideration, portion of, unlawful, effect of.

An agreement taken by a Pleader that he shall be given a part of the property in dispute in the suit in which he is engaged is contrary to public policy and, therefore, unlawful under s. 23 of the Contract Act. Where such an agreement in addition provides for the payment of money to the Pleader, the whole agreement is void under s. 24 of the Contract Act inasmuch as a portion of the consideration for the agreement is unlawful. [p. 200, col. 1.]

First civil appeal from the decision of the First Class Subordinate Judge at Dhulia, in Civil Suit No. 278 of 1922.

Mr. *K. H. Kelkar*, for the Appellant.

Mr. *P. V. Kane*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff stated in his plaint that he and one Shankar Shrikrishna Deo were engaged as Pleaders by defendant No. 1 in Suit No. 273 of 1917 filed against him in the Court of the First Class Subordinate Judge of Dhulia by one Bhagwan Devidas, that on September 23, 1917, when the *vakilpatra* was given to them, defendant No. 1 made a special contract in the following terms:—

"I have this day given you a *vakilpatra* in the above suit and agree to give you both Rs. 500 as *inam* or reward in case you obtain 'full success' for me in this or in the High Court, and would further give over to you possession of Survey No. 58 of Shahada, comprising 3 acres and 36 *gunthas* and assessed at Rs. 30, for religious or charitable purposes."

It is admitted that Survey No. 58 was part of the property in dispute in the suit. The suit was dismissed in the First Court on March 22, 1919, but in the first appeal the High Court granted relief to the plaintiff with regard to a portion of his claim.

The Trial Judge held that the agreement to give Rs. 500 as *inam* or reward in case the Pleaders obtained "a full success" could be enforced. But with regard to th obligation on the first defendant to giv

away to the Pleaders the lands for charity, he thought the claim was not sustainable.

The question then arose whether under s. 24 of the Indian Contract Act the agreement was void because one of several considerations for a single object was unlawful. The Judge said:—

"As it was not a reward given to them for their professional services, the clause of the *snam chitti* relating to it becomes a distinct agreement by itself, and is to that extent void for want of consideration. In fact, it operates as an agreement to make a gift of the land rather than an agreement to make a transfer of it for value. Further as the religious and charitable purposes have not been defined, the beneficiaries who are to take under it cannot be ascertained, and the agreement being thus too vague and uncertain cannot be specifically enforced, under s. 21 of the Specific Relief Act."

It is difficult to see how it can be said that the agreement to give land to the Pleaders for religious or charitable purposes can be separated from the agreement to give them Rs. 500 for their services in the case as Pleaders. It has been suggested that because the property was to be given over to religious or charitable purposes, it could not be considered as consideration given to the Pleaders for their services in the suit. I do not think the Court need be misled by such an argument. It was intended to be a gift of the property to the Pleaders, leaving it open to them to deal with it as they thought fit. The words "for religious and charitable purposes" were evidently added in the hope that the real object of the agreement might be concealed. But we think it clear that the consideration for the services of the Pleaders in the case was Rs. 500, and the gift of part of the property in suit. An agreement taken by a Pleader that he shall be given part of the property in dispute in the suit in which he is engaged must necessarily be contrary to public policy, and, therefore, unlawful under s. 23 of the Indian Contract Act. "It is professional misconduct for an Advocate to stipulate for or agree with his client to accept as his fee or professional remuneration a share of the property, fund, or other matter in litigation for his services as Advocate in such litigation upon the successful issue thereof." [See *In the matter of an Advocate* (1)] In *Laxmanlal* v. *Mulshankar* (2) a Pleader stood bail for his client pending a criminal charge against him, and as an indemnity for the bail took from him a sale-deed and a rent-note regarding his house, in the name of the plaintiff. The consideration for the sale-deed was a sum of Rs. 8,000, of which Rs. 5,000 were the indemnity for the bail-bond, and the remaining Rs. 3,000 represented the advances to be made thereafter by the plaintiff. The plaintiff sued on the rent-note to recover the sum of Rs. 2,000 as rent, and it was held (1) that the contract for indemnifying the Pleader for his bail-bond was illegal; and this illegality rendered the sale-deed void in law; (2) that the rent-note was tainted with the same illegality which affected the sale-deed and could not stand on any separate footing; and (3) that the agreement was an indivisible agreement. A part of a single consideration for one object was unlawful, and, therefore, the whole agreement was void under s. 24 of the Indian Contract Act, 1872.

In the same way in this case the agreement to pay Rs. 500 cannot be separated from the agreement to give Survey No. 58, part of the property in suit. We think, therefore, that the whole agreement was void. We allow the appeal and dismiss the plaintiff's suit with costs throughout.

Coyajee, J.—I am entirely of the same opinion.

Z. K. *Appeal allowed.*

(1) 4 C. L. J. 259
(2) 10 Bom. L. R. 553; 32 B. 449.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 57 OF 1924.
May 15, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

DWIJENDRA NATH MULLICK AND ANOTHER—DEFENDANTS —APPELLANTS

versus

GOPIRAM GOVINDARAM
PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Criminal breach of trust, prosecution for—Agreement by complainant to drop prosecution on obtaining mortgage of property from accused, whether opposed to public policy—Mortgage, suit on, maintainability of.

The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must also be applied with caution. The doctrine may legitimately be invoked if the real object of an agreement is to interfere with the course of justice. [p. 204, col. 2.]

An agreement to stifle a prosecution is distinguishable from the lawful compromise of a compoundable offence. But if the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy. [*ibid.*]

If the effect of an agreement is to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, the agreement is opposed to public policy. On the other hand there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him even if the debtor is induced to give the security by a threat of criminal proceedings so long as there is no agreement not to prosecute. [*ibid.*]

A man to whom a civil debt is due may take a security for that debt from his debtor even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute. He must not by stifling a prosecution obtain a guarantee from third parties. [p. 205, col. 2.]

Where a *bona fide* debt exists and the transaction between the parties involves a civil liability as well as a criminal act, a mortgage given by the debtor and a third party as security for the debt is not void under s. 23 of the Contract Act. [*ibid.*]

Defendant No. 1 committed criminal breach of trust in respect of a large sum of money belonging to the plaintiff. The Police started investigation and the case was lodged in Court. Defendant No. 1 and his brother defendant No. 2 executed a mortgage-deed for a certain sum, which was less than the amount of the money which had been misappropriated by defendant No. 1, in favour of the plaintiff and the plaintiff thereupon addressed an application to the Commissioner of Police stating all the facts of the case and asking that the case may be withdrawn. The Commissioner of Police stated on the application that he had no objection to the withdrawal of the case and the Magistrate thereupon dropped the proceedings. In a suit to enforce the mortgage:

Held, that the contract between the parties was not opposed to public policy and did not in any way tend to prejudice the State or hamper the administration of justice and that, therefore, it could not be held to be void under s. 23 of the Contract Act. [p. 205, col. 1.]

Appeal against the judgment and decree of the Subordinate Judge, Second Court, Howrah, dated the 21st December 1923.

Babus *Rupendra Kumar Mitter* and *Pashupati Ghose*, for the Appellants.

Sir *B. C. Mitter* and Babu *Jagat Chandra Bose*, for the Respondent.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the defendants and the question that it raises is whether the agreement on which the suit is based was opposed to public policy.

The first defendant Dwijendra was employed by the plaintiff firm, and on 3rd March 1919, he was sent to the Bank to cash a cheque for Rs. 30,000. He cashed the cheque and then went to the Police with the story that the money had been stolen from him. This story was found to be untrue and he was arrested. Friends of the family went to a Solicitor Mr. Akhoy Kumar Bose, and through his efforts it was arranged that the plaintiff firm would agree to the prosecution being given up, if they received Rs. 15,000 in cash and a mortgage for a sum of Rs. 5,000. This mortgage was executed by Dwijendra and his brother Rajendra and it is the document upon which the suit is based. The plaintiffs on their side carried out the terms of the arrangement: they signed a petition to the Commissioner of Police asking that the prosecution should not be continued, and the Commissioner gave his consent. The Presidency Magistrate afterwards wrote "file" on the petition: whether he passed a formal order of discharge or not, we do not know, but I do not think it is of any importance.

None of these facts has been challenged before us, and the arguments have been confined to legal points. It is urged that the consideration of the agreement was unlawful as offending against the principle laid down in s. 23 of the Contract Act. A second argument was that the plaintiffs cannot fall back upon the debt, but that argument need not be considered because Sir Benode Chandra Mitter for the respondents said he had no intention of doing so. A third argument is that at any rate the second defendant cannot be held liable.

The first argument, shortly stated, is that the agreement was one for stifling a prosecution. If that is a correct description of it, then it cannot be enforced, but the learned Judge has found to the contrary and has given his reasons for his conclusions.

The Statute Law of this country on the subject is to be found in s. 23 of the Contract Act. It is as follows:—"The consideration or object of an agreement is lawful, unless.....the Court regards it as immoral or opposed to public policy"..... *Illustration* (*h*)—"*A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful." The

illustration unfortunately does not throw much light on a difficult matter.

In the present instance there is no room for the suggestion that the plaintiffs are making "a trade of felony." On the contrary they assented to such generous terms that the defence set up by the appellants wears a most repulsive appearance If, however, the agreement was contrary to public policy as explained in the Contract Act and in English decisions then we shall have no alternative but to dismiss the suit, however, repugnant to our feelings such a course may be.

The offence with which defendant Dwijendra was charged was not compoundable under the provisions of the Cr. P. C., and if the negotiations are to be regarded as a composition of such a non-compoundable offence then the conclusion must be that the object of the agreement was contrary to public policy. It is necessary, therefore, to see what the arrangement was. It is fully described by Mr. Bose, the Solicitor, and he says that so far from pressure coming from the plaintiffs it was brought about at the request and entreaties of the defendants. In cross-examination he speaks about the case being withdrawn, and about the plaintiffs agreeing to drop the proceedings, but we must look at what the plaintiffs actually did to determine whether those expressions are correct.

The first thing they did was to write a letter or petition to the Deputy Commissioner: it was returned and another petition was written addressed to the Commissioner of Police. The plaintiffs had the assistance of the Public Prosecutor Rai Bahadur Tarak Nath Sadhu who was conducting the prosecution, and of their own attorneys in preparing these petitions. The terms of the two petitions are substantially the same: the plaintiffs said that they could not afford to lose the whole sum, and that it was to their advantage to get a portion, and they hoped that permission would be given for the case to be withdrawn. The plaintiffs did nothing further. It was the defendants who engaged Mr. Pugh, a Solicitor, to go to the Commissioner and urge him to allow the case to be withdrawn. He was successful, and the Commissioner wrote, "No objection to withdrawal of the case" and the Magistrate wrote "file," after which no further steps were taken in connection with the prosecution.

It is to be noted that the plaintiffs did not at any stage abate any part of their charge against the accused, and they did not suggest that they would withhold their evidence if the case proceeded. They laid all the facts before the Police and left it to the Commissioner of Police to decide whether the case should go on or not, and it was his decision that in the circumstances the charge might be withdrawn. I cannot find in the conduct of the plaintiffs any reason for supposing that if the Commissioner's decision had been different, the plaintiffs would have rendered the criminal proceedings abortive.

On this statement of the facts it must be allowed that the case comes very near the line, but on the whole I think that, whether we use the rhetorical expression of stifling a prosecution or the more homely words of the Contract Act, the action of the plaintiffs ought not to be regarded as contrary to public policy, because they did not take the administration of justice out of the hands of the authorities and themselves determine what should be done.

The first ground taken by the appellants fails.

There remains the third ground, namely, that the second defendant, Rajendra, is not liable. In his case it is said that there was no consideration. That seems a strange argument for any brother, perhaps I should say particularly for any Hindu brother, to put forward, and I regard the consideration as real and ample.

My conclusion is that the appeal should be dismissed with costs.

Mukerji, J.—The defendant No. 1 was a servant in the plaintiff firm. On the 3rd March 1919 the plaintiff firm handed over to the defendant No. 1 two cheques, one for Rs. 30,000 to be cashed at the International Banking Corporation, and the other a crossed cheque for Rs. 7,384-9-9 to be paid in the same Bank. The defendant No. 1 cashed the cheque for Rs. 30,000 but he did not pay in the other cheque for Rs. 7,384 9-9. He then telephoned to the plaintiff firm that the money had been lost, and at about 4-45 P.M., appeared at the Police Station and gave an information to the effect that 30 Government Currency notes for Rs. 1,000 each, one Chalan Book, and the cheque for Rs. 7,384-9-9 had been stolen from his right shirt-pocket. Thereupon he was arrested by the Police on suspicion. Immediately after the plaintiffs' man arrived at the Police Station and laid a charge o

criminal breach of trust against the defendant No. 1. The Police took up the investigation, in the course of which the defendant No 1 was let out on bail. He was eventually sent up for trial before the Chief Presidency Magistrate of Calcutta.

On the 7th March 1919 the defendant No. 2, brother of the defendant No. 1; arrived from Jhargram, where he had been from before. On the 14th March 1919 the two brothers and some other persons saw an attorney Mr. A. C. Bose and took his advice. The attorney advised them that there was no defence, and that the case would in all probability end in a conviction. The brothers then requested the attorney to bring about a settlement. The attorney sent for the plaintiffs. After some conferences an agreement was reached.

The settlement, as far as it can be ascertained from the evidence, was in this form: The plaintiffs were to give up Rs. 10,000 out of their claim and accept Rs. 15,000 in cash and a mortgage executed by the defendants Nos. 1 and 2 securing the balance of Rs. 5,000. The money would remain with a third party, one Manik Chand. The plaintiffs would then apply for withdrawal of the criminal proceedings and after they were withdrawn, would get the money and the mortgage-bond. On the 20th March 1919 a mortgage-bond was duly executed by the two brothers, for a sum of Rs. 5,000 hypothecating their 2/7th share in their joint family properties.

On the 1st April 1919 a petition signed by the informant on behalf of the plaintiffs was put in before the Deputy Commissioner on whose order the defendant No. 1 had been sent up for trial. The petition was in these words: "The complainants having recently suffered heavy loss owing to the fall in the piece-goods market and not being in a position to give up such an amount in their present state and the relations of the accused Dwijendra Nath Mullick having promised without prejudice to the pending criminal proceedings to make good a substantial portion of the loss of the complainant firm, *if the criminal case aforesaid now pending be withdrawn* and all terms having been settled, complainants pray that the aforesaid criminal case be withdrawn." Nothing much came out of this petition, presumably because the Deputy Commissioner could not interfere in the matter, the case having already gone before the Court. On the 16th April 1919 a petition purporting to have been filed on behalf of the complainant was filed before the Chief Presidency Magistrate. It stated that the accused (meaning the defendant No. 1) had approached complainant and offered to make good, as far as possible, the loss suffered by him, without prejudice to the case, that the financial condition of the firm would not allow them to refuse the offer and that under the circumstances the complainant did not wish to proceed with the charge against the accused. The prayer was that the accused might be discharged, if necessary, with the permission of the Court. The Chief Presidency Magistrate forwarded the petition to the Commissioner of Police with the remark: "To Commissioner of Police for favour of disposal." The latter reported that he had no objection to the withdrawal of the case and the Chief Presidency Magistrate on the 5th May 1919 passed the order "file" on the petition. Some days later the sum of Rs. 15,000 which was held by Manik Chand as aforesaid was received by the plaintiff firm. Thereafter, as is usual in such cases, the two defendants were not very anxious to register the mortgage deed. Consequently, it appears, a letter was written to them by the plaintiff's Solicitor, Mr. M. N. Sen, calling upon them to register the document and intimating to them that if they failed to do so he would present the mortgage at the Registry Office and apply for warrant for a compulsory registration. The letter also contained a threat that in case of such failure the plaintiff firm would also withdraw the petition which they had filed in Court for withdrawal of the case. It was also stated in the letter that a copy of it was being sent to Rai Bahadur Tark Nath Sadhu for his information. This gentleman, it should be stated, was the Public Prosecutor of Calcutta. Thereafter on the 1st May 1919 the document was registered, both the defendants admitting execution thereof.

On the 15th July 1922 the suit was filed for enforcement of the mortgage. The Court below decreed the suit, and hence the present appeal.

At the hearing of the appeal the facts alleged on behalf of the plaintiffs were mostly not disputed. It was no longer disputed that the information of theft was false or that the defendants approached Mr. A. C. Bose and on his advice sought his assistance to get a settlement effected with

a view to have the case withdrawn. It was no longer asserted that Rs. 15,000 had not been paid by the defendants as alleged on behalf of the plaintiffs, nor was it disputed that the mortgage-bond was duly attested in accordance with the provisions of the law. The findings of the Court below to the effect that the defendant No. 1 did actually commit the offence in respect of the sum of Rs. 30,000 and that Rs. 15,000 was paid back in some of the identical notes that had been mis-appropriated were not challenged. In fairness to the learned Vakil for the appellants however, it should be said, that in the face of the evidence on the record it is hardly possible to dispute or challenge any of the aforesaid facts or findings.

The appellants' arguments give rise to three questions:—First, as to whether the agreement embodied in the deed is enforcible in view of the provisions of s. 23 of the Indian Contract Act: second, as to whether the contract was vitiated for want of free consent; and third, whether it may be enforced as against the defendant No. 2 as evidently he was not a party to the offence and there was no liability on him for which he need have executed the mortgage.

In order to deal with the first question, the nature of the agreement has first of all to be ascertained with precision. As I have stated, it was to the effect that the plaintiffs were willing to accept Rs. 15,000 in cash and a mortgage from defendants Nos. 1 and 2 for Rs. 5,000 in satisfaction of their claim for Rs. 30,000. The defendants Nos. 1 and 2 were willing that the plaintiffs should have what they wanted but not if the criminal proceedings against the defendant No. 1 were not withdrawn and the plaintiffs in their turn were willing to abandon the prosecution if they got the cash and the bond. To give effect to this intention Rs. 15,000 was kept with a third party, the bond though executed remained unregistered, the plaintiffs put in the two petitions referred to above, the defendants engaged Counsel to explain matters to the Commissioner of Police and eventually got the necessary permission from him which practically ended the prosecution, and it was only after the proceedings had been "filed" that the plaintiffs received the money and the defendants got the deed registered.

The appellants' contention is that the agreement is void as the consideration or object of the agreement is opposed to public policy, and that it was in effect an agreement to stifle a prosecution. The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice. An agreement to stifle a prosecution is, of course, distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy. If the effect of an agreement is to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, it is opposed to public policy. [*Collins* v. *Blantern* (1), *Keir* v. *Leeman* (2) and *Williams* v. *Bayley* (3).] On the other hand, there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute: *Flower* v. *Sadler* (4).

The respondent's contention is that the prosecution was not in the hands of the plaintiffs, but in the hands of the Police and the Public Prosecutor was in charge of it, and that the plaintiffs did not institute it, there was no agreement to withdraw the case and in fact no withdrawal thereof, the only order proved in the case being one of "file" and it is urged that for these reasons the case is not covered by illus. (*h*) to s. 23.

Now, I am prepared to concede that the defendants would not have parted with the sum of Rs. 15,000 or completed the execution of the bond for Rs. 5,000, unless and until the criminal case against the defendant No. 1 was withdrawn, but I am not at all sure that the consideration or object of the agreement was the withdrawal of the said case. The motive for the execution

(1) (1765) 1 Sm. L. C. 11th Edn. 369; 2 Wils. K. B 341; 95 E. R. 847.
(2) (1844) 9 Q. B. 371; 15 L. J. Q. B. 360; 10 Jur. 742; 72 R. R. 298; 115 E. R. 1315.
(3) (1866) 1 H. L. 200; 35 L. J. Ch. 717; 12 Jur. (N. S.) 875; 14 L. T. 802.
(4) (1883) 10 Q. B. D. 572.

of the bond and the payment of the money was the withdrawal; but there is a good deal of difference between the motive for the act and the consideration or object of the agreement. It is necessary to keep this distinction in view all the more in a case where there is a civil liability already existing which is discharged or remitted by the agreement. Even if all the principles of English Common Law relating to agreements for stifling prosecution be held to be applicable to all kinds of non-compoundable offences in this country—a question about which I entertain some doubt in view of the fact that the offence of criminal breach of trust though declared non-compoundable by law is very often treated by the Courts as otherwise—then if the principle of the doctrine be that "you shall not make a trade of felony" [per Lord Westbury in *Williams* v. *Bayley* (3)], then it is difficult to see how the plaintiffs can be said to have acted improperly in entering into the arrangement to get what they were justly entitled to or rather much less than what they were so entitled, when they brought the whole matter to the notice of the authorities responsible for the conduct of the prosecution and left it to them to decide whether they should proceed or not. My learned brother does not find anything culpable or wrong in the conduct on the part of the plaintiffs and what they did does not also offend against my sense of fairness and propriety. Illustration (*h*), though not exhaustive, but only illustrative of the section, gives only a very gross and extreme instance. I am, therefore, not prepared to say that upon the peculiar facts of the present case the contract between the parties was one opposed to public policy or that in any way tended to prejudice the State or hamper the administration of justice.

As regards the second ground, namely, whether the contract is vitiated for want of free consent, there is scarcely any material which may bring the case within any of the clauses of s. 14 of the Contract Act. The parties had ample independent advice and it seems that the defendants not only did all that was necessary to be done willingly and out of their own accord but also on their own initiative. I attach no importance to the letter of Mr. M. N. Sen, referred to above, because the threat contained therein was merely for compelling the registration of the bond and as the registration thereof could be enforced by other means as well, the registration of the document by whatever means it was effected could not affect the character of the agreement which was already complete and the registration would give effect to the document from the date of its execution. The question of validity of the document is not affected so long as the registration is not held to have been without jurisdiction.

The appellants' last contention has not much substance. If the agreement was a valid one, and the appellant No. 2 voluntarily offered to join in the bond with his brother in whom he was interested, it must be presumed that there was a lawful consideration for the transaction. In the case of *Kessowji Tulsidas* v. *Hurjivan Mulji* (5), it was held that a guarantee for the payment to creditors of debts due to them in consideration of the creditor's abstaining from taking criminal proceedings is void, as being against public policy, but a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute, but he must not by stifling a prosecution obtain a guarantee from third parties. This principle has been followed in the case of *Jai Kumar* v. *Gauri Nath* (6), where it has been held that where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor and a third party as security for the debt is not void under s. 23 of the Contract Act.

For these reasons in my judgment the decision of the Court below is correct and the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(5) 11 B. 566; 6 Ind. Dec. (N. S.) 373.
(6) 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 77 OF 1924.
March 5, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

BAI LALBU—PLAINTIFF—APPELLANT
versus
MOHANLAL GOKALDAS JAVERI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Waste committed by judgment

debtor since date of decree—Damages—Procedure—Separate suit, whether lies.

Where in execution of a decree for possession it is alleged that waste has been committed by the judgment-debtor and he has caused wilful damage to the property after the date of the decree, the question is one arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree and not by a separate suit. If the execution Court finds that the alleged waste has been established it can award damages to the decree-holder against the judgment-debtor.

Hari Shridhar Prabha Desai v. *Sakharam Padmana Magdum*, 73 Ind. Cas. 443; 25 Bom. L. R. 449; (1923) A. I. R. (B.) 391, followed.

First appeal against the decision of the First Class, Subordinate Judge, Ahmedabad, in Darkhast No. 357 of 1923.

Mr. *G. N. Thakor*, (with him Mr. *R. J. Thakor*), for the Appellant.

Mr. *Ratanlal Ranchhoddas*, for the Respondent.

JUDGMENT.—In this suit a decree for specific performance was passed against the defendant on February 26, 1923. The plaintiff did not take the necessary steps to produce the purchase-money, so the defendant took out a *darkhast* on June 21, 1923, for payment of the purchase-money in order that the matter might be completed. The plaintiff then complained that the defendant had pulled down some of the bricks out of the property in dispute with a view to causing damage to him. A Commissioner was appointed, and he made a report showing the present condition of the building on November 17, 1923. The Commissioner could not decide whether the defendant had caused wilful damage to the building since the date of the decree. On the report the First Class Subordinate Judge made an order that time should be given to the defendant to replace the property in the suit in the same condition as it was at the date of the suit. That being done, the plaintiff should lodge the money in Court, and the defendant should give over possession of the property to the plaintiff. No reason is given for this order. The direction that the defendant should replace the property in suit in the same condition as it was at the date of the suit, was clearly wrong. The issue between the parties was whether the defendant between the date of the decree and the date of the *darkhast*, *i. e.*, June 21, 1923, had caused wilful damage to the property, so that on its being delivered to the plaintiff in pursuance of the decree the value would have been reduced. It is contended that that is not a question which arises in execution, and that the plaintiff will have to file a suit to have it decided. In *Hari Shridhar Prabha Desai* v. *Sakharam Padmana Magdum* (1) it was decided by this Court that the question with regard to the waste committed by a judgment-debtor after the date of the decree is a question arising between the parties relating to the execution, discharge or satisfaction of the decree and must be determined by the Court executing the decree, and not by a separate suit. In that case it was alleged that after the decree and while the appeal was pending the defendants committed waste by cutting down trees. There does not appear to be much difference between a case where an appeal has been filed, and the party remaining in possession commits waste, and a case where possession is directed to be given by a decree, and before possession is given waste is committed. The question is really whether a successful party can be said to get possession of what was directed to be given to him by the decree, if the party in possession deliberately has caused damage to the property. There is no reason why the question of damage should not be tried in execution.

We think then that the appeal must be allowed and the *darkhast* sent back to the lower Court to decide this issue, "whether between the date of the decree and the date of the *darkhast*, *i. e.*, June 21, 1923, the defendant caused wilful damage to the suit property." If that issue is found in the affirmative, then the next issue will be "what was the extent of damage." The Court, if it finds that there has been wilful damage caused to the property by the defendant, will be entitled to direct payment of that damage out of the purchase-money due by the plaintiffs. This order should not delay the prosecution of the *darkhast* with regard to the payment of the purchase price and delivery of possession. We leave it to the Judge to decide whether it will be necessary to take security from the defendant if the purchase price is paid into Court, for any damage that may be found to have been caused between the date of the decree and the date of the *darkhast*, *i, e.*, June 21, 1923. The appellant must get her costs in this Court. Costs in the lower Court will be costs in the *darkhast*.

Z. K. *Appeal allowed.*

(3) 73 Ind. Cas. 443; 25 Bom. L. R. 449; 1923) A. I. R. (B.) 391.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2386 OF 1920.

January 15, 1923.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.

NRIPENDRA NATH BHOWMIK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BASANTA KUMAR LAHIRI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Matter decided by Trial Court but not decided by Appellate Court, whether operates as* res judicata—*Subsequent suit based on different title, whether barred—Relief, ancillary, refusal of, effect of—Decree, form of—Mesne profits, ascertainment of, stage of.*

To support a plea of *res judicata* it is not enough that the parties to both the suits are the same and that the same matter is in issue. The matter must have been heard and finally decided in the previous suit. [p. 208, col. 2.]

Where there is an appeal from the decision of the First Court, the finality of that decision is destroyed and the judgment of the First Court is superseded by the judgment of the Court of Appeal. If the Appellate Court does not, for any reason, think fit to decide a certain matter arising in the suit it is left an open question and the decision of the Trial Court on that matter does not operate as *res judicata* in a subsequent suit between the parties. [*ibid.*]

Where a declaration of title in a suit is claimed merely as a step towards the decree sought, namely, a decree for possession, and the suit with regard to the relief for possession is dismissed on the ground of limitation and no finding is given on the question of title, the mere fact that the relief as to declaration has not been granted will not, under Exp. V to s. 11 of the C. P. C., operate to render the question of title *res judicata* in a subsequent suit. [p. 209, cols. 1 & 2.]

The eventual reversioner does not claim through any one who goes before him. [p. 210, col. 1.]

A suit by the plaintiffs to recover possession of a lease-hold interest in which they claimed as the heirs of their father was dismissed on the ground of limitation. Subsequently they brought a suit to recover the property claiming, not through their father, but as reversionary heirs of the last full owners :

Held, that the suit was not barred by the principle of *res judicata* inasmuch as (*a*) the question of title was not heard and finally decided in the previous suit and (*b*) the subsequent suit was not based upon the same title as the previous suit. [p. 209, col. 2.]

Before passing a decree the Court ought to be satisfied whether the decree, if passed, will be capable of execution. [p. 210, col. 2.]

A claim for mesne profits must be investigated in further proceedings after the decree and a plaintiff cannot be blamed for not adducing evidence as to the amount of mesne profits claimed by him before the decree has fixed the period for which the mesne profits would be payable. [p. 211, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Faridpur, dated the 13th of August 1920, reversing that of the Munsif, Second Court at Goalundo, dated the 20th of August 1919.

Babus *Tarak Chandra Chakravarty*, *Phanindra Lal Moitra* and *Profulla Chandra Chakravarty*, for the Appellants.

Babus *Surendra Chandra Sen* and *Hemendra Chandra Sen*, for the Respondent.

Babu *Biraj Mohon Mazumdar*, for the Deputy Registrar.

JUDGMENT.—This appeal arises out of a suit for establishment of the right of the plaintiffs to, and recovery of possession of, two *taluks* and five *jotes* as reversionary heirs of two ladies, Bhabani and Padmamani. The defendants are the lessees under the widows, who are now dead.

It appears that the plaintiffs' father Prasanna executed a mortgage in respect of the *taluks* and the *jotes* in favour of one Raj Kumar, the defendants' father, on the 12th November 1880, evidently treating the properties as belonging to him alone. Three ladies of the family (including the two named above) however got their names registered, each in respect of her 4-annas share as heirs by right of succession to the last five owners respectively in 1882. In 1883, Raj Kumar the mortgagee, obtained a lease from the three ladies in respect of 12 annas share in the name of his grandson Basanta. In 1891, Raj Kumar brought a suit for foreclosure upon the mortgage, which resulted in a compromise. It was agreed that there would be a decree for foreclosure in respect of 16 annas against Prasanna, but that the mortgagee would grant a lease thereof to him, that Basanta would surrender the lease, which he had obtained from the three ladies and that Prasanna would be the lessee under Raj Kumar. A decree was made accordingly. The lease taken by Basanta from the ladies was surrendered by him notwithstanding objections raised by the ladies.

In 1903, a suit was instituted by the plaintiffs against the defendants (the two ladies being joined as parties defendants) for recovery of the lease-hold interest, in respect of which the plaintiffs had been dispossessed by the defendants in 1895. There were certain other properties included in that suit, which were not the subject-matter of the compromise.

In that suit the plaintiffs alleged that the widows Bhabani and Padmamani did not inherit the shares from the last full owners. The suit was decreed in part by

the Subordinate Judge but the decree was reversed by the District Judge who held that the dispossession had taken place in 1883 when the lease was granted and that the suit, therefore, was barred by limitation. There was a second appeal to this Court and it was disposed of on the ground that the plaintiffs' suit was barred by limitation as the plaintiffs's possession within 12 years was not proved.

Bhabani and Padmamani having died within 12 years of the suit, the plaintiffs instituted this suit for recovery of possession of the properties on the allegations that those ladies held only the estate of a Hindu widow and that the alienation in favour of the defendants was fraudulent and not for legal necessity and, therefore, not binding upon the plaintiffs.

The main defence was that the decision in the suit of 1903 operated as *res judicata*, and that the plaintiffs were estopped from making the allegation which was made in the plaint in the present suit and which was contrary to the statements made in the previous suit of 1903. The defendants also pleaded that there was legal necessity for the leases which were executed by the ladies.

The Court of first instance held that the decision in the suit of 1903 did not operate as *res judicata*, nor were the plaintiffs estopped and that legal necessity was not proved. That Court accordingly held that the plaintiffs were entitled to succeed in respect of the two *taluks*, but not with respect to the five *jotes*, as the properties had not been sufficiently specified in the plaint, nor were the plaintiffs entitled to claim mesne profits.

On appeal, the learned Subordinate Judge held that the decision in the suit of 1903 operated as *res judicata* and that the plaintiffs could not be allowed to take up inconsistent positions and were precluded by the principle of estoppel. In the result, the suit was dismissed.

The plaintiffs have appealed to this Court.

The first question raised is whether the decision in the suit of 1903 operates as *res judicata*.

It is contended by the learned Pleader for the appellants that in the lower Appellate Court there was no decision on the question of adverse possession on behalf of the ladies. But assuming that there was, the next contention is that having regard to the judgment of the High Court which proceeded merely upon the finding that the plaintiffs were not in possession within 12 years, the question of title based upon adverse possession could not be held to have been heard and finally decided by the High Court.

We think that this contention is correct.

Assuming that the learned District Judge had found that the ladies were in adverse possession, that was not the ground upon which the High Court proceeded to dispose of the case. The decision of the lower Appellate Court became *sub judice*, a second appeal having been preferred to this Court; and this Court as stated above, did not express any opinion upon the question of adverse possession. The principle is enunciated in several cases and we need only refer to some of them.

In the case of *Chunder Coomar Mitter* v. *Sib Sundari Dassee* (1), it was pointed out that "when the decision of a lower Court is appealed to a superior Tribunal, and that Tribunal for any reason does not think fit to decide the matter, it is left an open question. We have held so here over and over again; and it is not because in point of form the appeal in the first suit was dismissed, that the decision of the Munsif can be considered as confirmed."

In the case of *Sheosagar Singh* v. *Sitaram Singh* (2), the Judicial Committee observed as follows :—"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided.' If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the Suit of 1885 was, no decision ought to have been pronounced on the merits." See also *Gungabishen Bhugut* v. *Roghoo Nath Ojha* (3), *Ghurphekni* v. *Purmeshar Dayal Dubey* (4), *Abdullah Ashgar*

(1) 8 C. 631 at p. 634; 11 C. L. R. 22; 4 Ind. Dec. (N. S.) 406.
(2) 24 C. 616 at pp. 626, 627; 1 C. W. N. 297; 24 I. A. 50; 7 Sar. P. C. J. 124; 12 Ind. Dec. (N. S) 1079 (P. C.).
(3) 7 C. 381; 9 C. L. R. 34; 3 Ind. Dec. (N. S.) 794.
(4) 5 C. L. J. 653.

Ali Khan v. *Ganesh Dass* (5) and *Nilvaru* v. *Nilvaru* (6).

It has, however, been contended by the learned Pleader for the respondent in the first place that the learned District Judge in the Suit of 1903 having considered the question of limitation along with the question whether the ladies inherited the properties, the High Court must be taken to have accepted the finding on the question of possession as it was mixed up with the question of title.

We do not see, however, that the High Court did any such thing. The judgment of the High Court on the point runs as follows:—"As regards the other 12-annas share, the ladies, two of whom are defendants, claim those shares and say as regards those shares that the plaintiffs were dispossessed in 1883 and have continued out of possession ever since. This has been found as a fact by the lower Appellate Court and that as regards those shares the suit is barred by limitation. On the findings of fact, this conclusion appears to be correct."

The judgment of the High Court, therefore, was based on the fact that the plaintiffs were not in possession within 12 years of the suit. The question of title cannot be said to have been mixed up with the question of possession in such a way that the question of limitation could not be decided apart from the question of title.

In the next place, it has been contended that the Expl 5 of s. 11 should be taken into consideration. It is urged that there was a prayer in the plaint in the Suit of 1903 for a declaration that the defendants had no title to the properties, and that that declaration not having been granted must be taken to have been refused, having regard to the express provisions of Expl. 5 of s. 11, C. P. C.

But we think that the declaration which was claimed by the plaintiffs in the prayer was not a declaration under s. 42 of the Specific Relief Act but a declaration which led up to the main relief claimed in the suit, namely, possession. In the words of the Judicial Committee in the case of *Waliham* v. *Jogeshwar Narayan* (7), that was "merely an argumentative step towards the only decree sought, *viz.*, possession." and the Court was not entitled to make a declaration with regard to the third prayer in the plaint after the failure of the sole cause of action, namely, the plaintiff's dispossession within 12 years.

In the third place, it has been contended that in the cases cited above the Appellate Court expressly declined to go into the other questions decided by the lower Court.

But in the case of *Nilvaru* v. *Nilvaru* (6), there was no such express reservation and yet it was held that the question was not finally decided. We think that upon the express terms of the section (s. 11 of the C. P. C.) it cannot be said that a matter is finally heard and finally decided by the Court of Appeal when for any reason it does not think fit to go into the question. In the present case the High Court having disposed of the case merely upon the ground of limitation must be taken not to have decided any other question.

Then, it is to be observed that the plaintiffs claim the *taluki* right in the present suit under a title different from that under which they claimed the lease-hold interest in the suit of 1903. That was a right inherited by them from their father. The title upon which the plaintiffs have instituted the present suit is a title not derived from their father but a title which they claim as having devolved upon them as reversionary heirs of the last full owners—Swarup and Benimadhab. That being so, the principle of *res judicata* cannot apply as the two suits were not litigated under the same title.

The next point is whether the plaintiffs are estopped by reason of the statements made by them in the suit of 1903.

In the previous suit the plaintiffs' case was that Bhabani and Padmamani did not inherit, and that the plaintiffs' grandfather had inherited those shares. In the present suit the plaintiffs' case is that the widows had inherited those shares. The learned Subordinate Judge also refers to the statements of the plaintiffs' father in the mortgage-bond and also in the suit for foreclosure on the mortgage, in which he asserted the right to the property to the exclusion

(5) 42 Ind. Cas. 959; 45 C. 442; 22 C. W. N. 121; 128 P. W. R. 1917; 22 M. L. T. 451; 3 P. L. W. 381; 26 C. L. J. 568; 15 A. L. J. 889; 19 Bom. L. R. 972; 34 M. L. J. 12; 7 L. W. 62; 132 P. L. R. 1917; (1918) M. W. N. 7; 44 I. A. 213 (P. C.).

(6) 6 B. 110; 3 Ind. Dec. (N. S.) 531.

(7) 35 C. 189 at p. 193; 12 C. W. N. 227; 7 C. L. J. 44; 10 Bom. L R. 9; 17 M. L. J. 226; 2 M. L. T. 509; 14 Bur. L. R. 101; 35 I. A. 38 (P. C.).

of the widows. But these statements cannot bind the plaintiffs because, as already stated, the plaintiffs claim the properties not as heirs of their father but as reversionary heirs of Swarup and Benimadhab. An eventual reversioner does not claim through any one who goes before him. As pointed out in the case of *Bahadur Singh* v. *Mohar Singh* (8). "The then claimants were only expectant heirs with a *spes successions*. The appellants claimed in their own right as heirs of Mohar when the succession opened and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent". [See also *Rangaswami Gounden* v. *Nachiappa Gounden* (9).]

So far as the plaintiffs themselves are concerned, there is no doubt that the present statements are inconsistent with what was stated in the suit of 1903.

But there has been no change of position by reason of the statements made by the plaintiffs in the Suit of 1903. The leases upon which the defendants base their right were granted by the widows in 1883—about 20 years before the Suit of 1903. They could not have been affected in the matter of taking the leases by any statements made by the plaintiffs 20 years subsequently. As a matter of fact, the lessors had registered their names and had granted the leases to the defendants on the footing that they had inherited the estate from the last full owners.

It is contended by the learned Pleader for the respondents that had the plaintiffs set up the right, they now set up, in the Suit of 1903, the defendants might have taken steps for preservation of evidence on the point.

There is no evidence to show, however, that any evidence bearing on the point has, since 1903, been destroyed.

We are accordingly of opinion that the plaintiffs are not precluded by the principle of estoppel, and that the plaintiffs would be entitled to the shares of the two *taluks* provided the other questions raised in the case are decided in their favour. But the question of legal necessity, as also the main question whether the plaintiffs inherited the property as reversionary heirs of Swarup and Benimadhab, or whether the widows Bhabani and Padmamani held the properties by right of adverse possession and any other question that might be necessary to be decided in the case, have not been gone into by the lower Appellate Court, as its decision proceeded only upon the questions of *res judicata* and estoppel.

The case must, therefore, go back to the lower Appellate Court for a decision upon the other points raised in the case.

Then the next question is whether the plaintiffs are entitled to get a decree for the five *jotes*.

Upon that point, both the Courts below have come to the conclusion that they are not so entitled because the properties have not been sufficiently specified in the plaint.

The learned Pleader for the appellants has contended that as the prayer was not for actual possession, the description given in the plaint was sufficient as it would be necessary only to notify to the tenants that the rent was to be paid to the plaintiffs.

But the land with respect to which the rent is to be paid must be specified in the decree, and the question whether the lands have been sufficiently specified, is a question which we cannot go into in second appeal. The Court of first instance says: "There is no doubt of the fact that the description as given in the schedule is not sufficient for identification of the holding." Then after stating certain reasons, the learned Munsif says: "There is no other description of the *jotes* except by schedule to the plaint. Defendants have, therefore, raised a valid plea when they say that the suit will fail for want of proper description. The learned Pleader for the plaintiff argues that defendant had no difficulty in identifying the lands as the very same description appears in defendant's documents of title. This argument has no force as before passing the decree the Court ought to be satisfied whether the decree, if passed, will be capable of execution. I could not, therefore, agree with the learned Pleader for the plaintiff in leaving the matter open for the Execution Department." The claim with regard to the five *jotes* accordingly was disallowed by the Court of first instance on the ground of indefiniteness. The learned Subordinate Judge also finds that the description as given in the schedule

(8) 29 I. A. 1; 24 A. 94; 6 C. W. N. 169; 4 Bom. L. R. 233; 12 M. L. J. 56; 8 Sar. P. J. 152 (P. C.).

(9) 50 Ind. Cas. 498; 42 M. 523 at p. 536; 23 C. W. N. 777; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; (1919) M. W. N 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P. C.).

is not sufficient for the identification of the lands. As already stated, the question whether they are or are not sufficient for identification is one for the Court dealing with facts to decide and we cannot go into the question. The claim with regard to the five *jotes*, therefore, must be dismissed.

The last question is whether the plaintiffs are entitled to mesne profits with regard to the shares of the two *taluks*.

It appears that a claim was made in the plaint for mesne profits and the claim was valued at Rs. 100, but it was disallowed by the Court of first instance on the ground that no evidence had been adduced before it and no application had been made for the hearing of the matter in further proceedings.

We do not see, however, why the claim should not be gone into after the decree. That is what is usually done. Formerly the claim for mesne profits used to be investigated in the Execution Department and now in further proceedings after the decree. The plaintiffs could not be blamed for not adducing evidence as to the amount of mesne profits before the decree had fixed the period for which the mesne profits would be payable. In these circumstances, if the plaintiffs get a decree in respect of the *taluks*, the Court should decide whether the plaintiffs are entitled to any mesne profits, and if so, for what period, the actual amount of the mesne profits being left to be determined in further proceedings.

The result is that the claim with regard to the five *jotes* is dismissed with half costs in all Courts.

With regard to the claim for the two *taluks*, the case is remanded to the lower Appellate Court to be dealt with in accordance with the observations made above. Costs (one-half) to abide the result.

Z. K. *Case remanded.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 171 OF 1923.

March 10, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

LAXMAN WAMAN GADRE—PLAINTIFF—APPELLANT

versus

SARASWATI GANESH GADRE—AND OTHERS—DEFENDANTS—RESPONDENTS.

Costs—Defendants claiming in separate interests—Separate costs—Taxation—Order directing how costs are to be taxed—Appeal, whether lies.

However large the number of the defendants may be who are claiming in separate interests they are entitled to appear and defend the suit and each defendant's Pleader would be entitled, under the Bombay Pleaders Act, to charge a fee based on the suit valuation for the purpose of Pleader's fees. In such a case where the defendants are successful and their costs are ordered to be paid by the losing party each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself.

Quære:—Whether an appeal lies under any of the provisions of the C. P. C. against an order of a Judge directing how costs are to be taxed.

First appeal from the decision of the First Class Subordinate Judge at Nasik, in Application No. 62 of 1922, in Original Suit No. 448 of 1920.

Mr. *J. R. Gharpure*, for the Appellant.
Mr. *P. G. Babat*, for the Respondents.

JUDGMENT.—In this case the plaintiff's suit was dismissed, and he was ordered to pay the defendants' costs. When the decree was drawn up the plaintiff contended that the costs payable by the plaintiff were not in accordance with the judgment. Defendants Nos. 1 and 2 were allowed their costs on the valuation of the plaintiff's suit. Defendant No. 3 was also allowed his costs on the same value. The plaintiff then applied to the Judge to alter the method of taxation as appearing in the decree. The Judge declined to alter the taxation. The plaintiff has appealed, it would appear, not against the decree, which embodied the directions given in the judgment, but against the taxation of the costs. We doubt very much whether an appeal lies under any of the provisions of the Code against an order of the Judge directing how costs are to be taxed. However that may be, it is quite clear that the defendants were entitled to their costs taxed on the basis of the valuation of the plaintiff's suit. However many the defendants may be claiming in separate interests, they are entitled to appear and defend the suit, and each defendant's Pleader would be entitled under the Bombay Pleaders Act to charge a fee based on the suit valuation for the purposes of Pleader's fees. So that as the defendants were successful and their costs were ordered to be paid by the losing party, each defendant was entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in

the suit itself. The appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1504 OF 1922.

January 21, 1924.

Present:—Mr. Justice Moti Sagar.

HIRA SINGH AND OTHERS—PLAINTIFFS APPELLANTS

versus

ARJAN SINGH, MINOR, THROUGH KARTAR SINGH, HIS BROTHER, AND OTHERS—DEFENDANTS, KISHAN SINGH AND OTHERS—PLAINTIFES—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6—Expectancy—Custom—Agreement by collateral not to contest gift by childless proprietor—Registration Act (XVI of 1908), s. 17 (1) (b).

An agreement by a collateral not to contest a gift of ancestral property by a childless proprietor is neither a transfer of an expectancy nor an assignment or extinguishment of any right, title or interest to or in immoveable property. Therefore, such an agreement is neither illegal, under s. 6, Transfer of Property Act, nor does it require registration under s. 17 (1) (*b*) of the Registration Act. [p. 212, col. 2; p. 213, col. 1.]

Second appeal from a decree of the District Judge, Ludhiana, dated the 4th March 1922.

Lala *Fakir Chand*, for the Appellants.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—On the 1st of March 1916 one Ram Ditta, a *Jat* of *Mauza* Chima in the Ludhiana Tehsil, executed a deed of gift in respect of 12 *bighas* 12 *biswas* and 1 *biswansi* of land and one-half share of two houses in that village in favour of one Arjan Singh, the daughter's son of one Basawa Singh, his first cousin. This gift was assented to by some of the reversioners of Ram Ditta who are now represented by the present appellants and in token of their assent they executed a document on the 13th of June 1916 by which they admitted that they had no rights in the property gifted and undertook not to raise any objections in respect thereof at any future time. Ram Ditta having died the present suit was brought on the 6th of February 1920 by his reversioners in whom were included also the reversioners who were the signatories of the document of the 13th of June 1916 on the allegation that Ram Ditta was a childless proprietor and was not authorised to make a gift according to the Customary Law of the Province by which he was admittedly governed. The defendants denied the ancestral character of the land and pleaded that the gift was valid by custom. It was further contended that some of the plaintiffs had assented to the gift and that they, at any rate, were not entitled to maintain this suit.

Both the Courts below have held that the property was ancestral and that the gift was invalid by custom. With regard to the reversioners who were parties to the agreement dated the 13th of June 1916, it was found that they had assented to the gift and that the suit, so far as it related to their shares in the property concerned, should be dismissed.

The plaintiffs, whose suit has been dismissed, have now come up in second appeal to this Court and two contentions have been raised on their behalf by their learned Vakil Mr. Fakir Chand. His first contention is that the document, dated 13th June 1916, which according to the defendants bars the plaintiffs' suit, is inadmissible in evidence for want of registration, and s. 17 (1) (*b*) of the Indian Registration Act is relied on in support of this contention. In my opinion there is no force in this contention. According to s. 17 (1) (*b*) all non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 or upwards to or in immoveable property are compulsorily registrable. The question for decision is whether the document in question purports to declare or extinguish any rights in present or in future in immoveable property of the value of Rs. 100. Now looking to the terms of the document it appears to me that it was clearly outside and beyond the scope of this section. All that the executants of the document had at the time the document was executed was a *spes successionis* as reversioners. In the document they neither purport to convey anything nor to declare or extinguish any vested or contingent rights in any property. They merely give their consent to the gift which had been made by Ram Ditta and undertaken not to raise any objection in respect thereof at any future time. The relevant portion of the document is to the following effect:—

Jo ke arazi Musammi Ram Ditta urf

Ram Singh, pisr Khazan Singh, Quam Jat, sakna Chima, Tahsil Ludhiana, ne banam Arjan Singh, apne dhote ko hiba kardi hai, is arazi mazkura bala par mazharana ka kisi kisim ka wasta nahin raha. Ainda ko babat arazi kisi kism ka tanaza nah karenge.

These words, in my opinion, which only embody an undertaking by the executants of the document not to contest the gift at any future time, clearly do not amount to an extinguishment of any rights in the property and I must, therefore, hold that the learned District Judge was right in holding that the document did not require registration.

Next, it was argued that the agreement was illegal on the ground that it dealt with an expectancy. Section 6 of the Transfer of Property Act and a recent ruling of their Lordships of the Privy Council reported as *Ananda Mohan Roy* v. *Gour Mohan Mullick* (1) were relied on in support of this contention. Here again the words of the document are very clear and cannot by any stretch of language be held to mean that any rights in expectancy were being transferred. As already observed, there was no renunciation of any rights and all that was undertaken was that the executants of the document would not object to the gift which Ram Ditta had executed in favour of Arjan Singh. The statement in the document that that executants had no rights in the property gifted was surely not intended to mean that the reversionary rights which they undoubtedly possessed in that properly were being conveyed or transferred in favour of any other person. Section 6 of the Transfer of Property Act, which prohibits the transfer of expectancy rights, is wholly irrelevant and cannot possibly apply to the facts of the present case. The Privy Council ruling relied on related to a case where an expectant heir actually sold certain immoveable property to which he expected to succeed upon the death of a certain widow and agreed to transfer it to the vendee upon possession accruing to him. It was held that the contract was void under s. 6 of the Transfer of Property Act which forbids the transfer of expectancies. It is obvious that in the present case no expectancy rights have been transferred and the ruling relied upon cannot, therefore, apply.

In my opinion the decision of the lower Court is correct and there is no force in this appeal. The result is that the appeal fails and is dismissed with costs throughout.

S. D. *Appeal dismissed.*

(1) 74 Ind. Cas. 499; 50 C. 929; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 265; 50 I. A. 239; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 18 OF 1920.

April 9, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

RANCHHORDAS MATHRADAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

VALLABHDAS KANJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Practice—Appeal to Privy Council, non-prosecution of—Costs of application for leave to appeal, order as to.

Defendants obtained leave to appeal to the Privy Council against a decree of the High Court. Leave was granted and costs of the application were made costs in the appeal. Defendants took no further steps to prosecute the appeal before the Privy Council and the appeal was consequently dismissed under the Privy Council rules without further orders. On the fact of the dismissal being communicated to the High Court:

Held, that the plaintiffs-respondents were entitled to the costs incurred by them in the High Court on the petition filed by the defendants to obtain a certificate for leave to appeal to the Privy Council.

Mr. *Lalji*, for the Appellants.

Mr. *Munshi*, for the Respondents.

JUDGMENT.—In this case leave to appeal to the Privy Council was obtained by the defendants. Thereafter they took no steps to prosecute the appeal, and on October 18, 1923, the Registrar of the Privy Council addressed a letter to this Court as follows:—

"I have the honour to inform you that the appellants have taken no step in prosecution of the above appeal although four months have now elapsed since the date of the arrival of the record in England, and that by virtue of r. 34 of the Judicial Committee Rules 1908, the said appeal stands dismissed for non-prosecution as from to-day without further order.

"I have accordingly to request you to be

good enough to bring this communication before the Judges of your Court, in order that the necessary steps may be taken to terminate the proceedings".

Nothing further has been done. Therefore, it would be necessary for this Court to give directions in accordance with the Registrar's letter with regard to the costs of the application for leave to appeal to the Privy Council. Those costs had been made costs in the appeal. As the appeal was dismissed for non-prosecution without further order of the Privy Council, no order was made with regard to those costs. It makes no difference that the petitioners applied to the Privy Council for restoration of the appeal. That petition failed, and the petitioners were directed to pay the taxed costs in England of the respondents opposing the petition. We are, therefore, restored to the original position at the time the Registrar's letter of October 18, 1918, reached this Court. We think that as the appellants took no further steps to prosecute the appeal, the respondents were entitled to the costs incurred by them in this Court on the petition filed by the appellants to obtain a certificate for leave to appeal to the Privy Council. That order would include the costs of the present application. The respondents are not entitled to the costs of the appearance before Mr. Justice Taraporewala.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 571 OF 1924.

May 8, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

TULA RAM—JUDGMENT-DEBTOR—APPELLANT

versus

BHUP SINGH—DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage-decree—Appeal—Application for final decree—Limitation, commencement of.

A mortgage-decree was passed in a suit to which the mortgagor and his sons were impleaded as defendants. The sons contested the suit on the ground that there was no legal necessity for borrowing the amount of the mortgage and contended that no portion of the joint family property was liable to be sold in execution of the mortgage decree. The sons preferred an appeal against the mortgage-decree but did not implead their father as a party to the appeal. The appeal was dismissed:

Held, that limitation for an application by the decree-holder for a final decree began to run not from the date of the decree of the Trial Court but from the date of the dismissal of the appeal inasmuch as the whole case was re-opened in appeal, and if the Appellate Court had allowed the appeal it would have had to dismiss the entire suit not only as against the sons but as against the father so far as the joint family property was concerned. [p. 215, col. 1.]

Second appeal from a decree of the District Judge, Aligarh, dated the 8th of January 1924.

Dr. *N. C. Vaish*, for the Appellant.

JUDGMENT.—This is a judgment-debtor's appeal arising out of an application for a decree absolute in which the main plea is that the application is barred by time. It is surprising to find that both the Courts below call the proceeding an execution of the decree which of course it is not. It appears that the plaintiff instituted a suit for sale on the basis of a mortgage-deed executed by Tula Ram, the appellant, himself impleading his sons, Jugal Kishore and Ratan Lal. A preliminary decree for sale was passed on the 16th of April 1918 against all the three defendants and the time fixed for payment was the 17th of October 1913. The sons had contested the suit on the ground that there was no legal necessity for borrowing the amount. They had preferred an appeal to the District Judge in July 1918 which was dismissed on the 2nd of November 1918 and a second appeal to the High Court by them was also dismissed on the 31st of March 1921. It is to be noted that neither in their appeal before the District Judge nor in their appeal to the High Court did the sons implead their father Tula Ram but they opened up the whole decree and urged that no portion of the joint family property was at all liable to be sold.

The decree-holder claims that he is entitled to calculate the time for making the application for the final decree from the date of the Appellate Court's decree. If time is to be counted from that date the application is within time. If not then it was presented more than three years after the preliminary decree by the First Court was prepared. The Court below has held that in this case the application is not barred by time and has relied on the Full Bench case of *Gajadhar Singh* v. *Kishan Jivan Lal* (1).

The present case is different from cases where a number of defendants who hold

(1) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.

portions of property independently and who were parties to the original suit are not made parties in appeal. In the present case the appeal had been preferred by the sons on behalf of and in the interest of the whole family. The point raised was that the entire family property was to be exempted from the decree. The success of the appeal would have enured for the benefit of the whole family including Tula Ram, the executant. It must, therefore, be assumed that the appeal was preferred on behalf of the whole family, but, of course, in the name of the sons only who were not disqualified from challenging the validity of the loan advanced. The whole case was re-opened and the Appellate Court if it had allowed the appeal would have had to dismiss the entire suit not only as against the sons but even as against Tula Ram. Under these circumstances the view taken by the learned Subordinate Judge that it was the decree passed in appeal in which the First Court's decree merged and from which date time would be counted seems to be correct. We accordingly dismiss the appeal but without any order as to costs as no one appears for the respondent.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 36 OF 1925.
April 6, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

DEVKARAN BHOLARAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

SANGIDAS JESIRAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XI, r. 21—Affidavit of documents, order directing—Non-compliance with order—Order directing defence to be struck out, when to be made—Death of party against whom order for affidavit of documents was made, effect of—Legal representatives, whether bound by order.

Under r. 21 of O. XI of the C. P. C. a defendant is liable to have his defence struck out only when an order of the Court has not been obeyed and even then the Court should direct that the defendant be called upon to show cause why his defence should not be struck out. That penalty will only be imposed when it can be shown that non-compliance with the order of the Court is due to wilful default. [p. 216, col. 2.]

Where an order for affidavit of documents is made against a party who dies before the order is complied with, the order does not *ipso facto* bind the legal representatives of that party who are substituted in his place on the record, and if it is desired that such legal representatives should file an affidavit of documents a fresh order to that effect must be obtained against them. [*ibid.*]

Sir *Chimmanlal Setalvad*, for the Appellants.

Mr. *B. J. Desai* and Sir *Thomas Strangman*, for the Respondents.

JUDGMENT.

Macleod, C. J.—This is an appeal against the order of Mr. Justice Taraporewala striking out the defence of defendants Nos. 2 and 2-A in an interpleader suit filed by Crystal & Co. in January 1923. The original dispute with regard to the money paid into Court by the plaintiffs was between the second defendant Devkaran Bholaram and the third defendants Messrs. Tullockchand and Shapurji a firm. The fourth defendant was afterwards added by the order of February 14, 1923. No order was made discharging plaintiffs and giving directions with regard to the procedure to be adopted for determining the questions in issue between the defendants. There seems to have been considerable delay in filing the written statements, and thereafter an order for affidavit of documents was obtained by the Attorneys for the first, third and fourth defendants against the original second defendant on March 7, 1924. The original second defendant died on June 18, 1924, without having filed his affidavit of documents, and the present defendants Nos. 2 and 2-A were brought on the record in his place on September 4, 1924. The proper course for the third and fourth defendants' Attorneys then to pursue was to get an order against the newly substituted defendants for an affidavit of documents, and their failure to do that has vitiated the subsequent proceedings. Instead of getting that order they wrote calling upon these defendants to file their affidavit of documents. The Attorneys of these defendants on December 16, 1924, promised to furnish a copy of their clients' affidavit in the course of a week. But as the affidavit was not forthcoming, thereafter Messrs. Bhaishankar Kanga and Girdharlal naturally became impatient, so they took out a chamber summons applying for an order that defendants Nos 2 and 2-A shou'd file their affidavit of documents and that in

default of their doing so their defence should be struck out and the suit set down for an *ex parte* decree. In his affidavit in support of the summons (para. 9) the fourth defendant says:—

"The fourth defendant's Attorneys repeatedly called upon the defendants Nos. 2 and 2-A to file their affidavit of documents and to furnish a copy thereof, but they have failed to file the same up to now. Under the aforesaid circumstances, I pray that the appearance filed on behalf of defendants Nos. 2 and 2-A and their defence may be struck off and they be placed in the same position as if they had not appeared and defended this suit."

If defendants Nos. 2 and 2-A had already disobeyed an order of the Court, then that was the right procedure to follow. But as defendants Nos. 2 and 2-A had merely failed to fulfil the promise made in correspondence, and there was no order of the Court which they had disobeyed, that procedure was wrong. When the summons came before the Judge he made an order that defendants Nos. 2 and 2-A should file their affidavit of documents within three weeks from the date of the order, and that in default of their doing so their appearance and the defence, if any, should be struck off from the suit. Presumably that order was made under O. XI, r. 21, C. P. C. That rule says:

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly."

On March 9, the Attorneys of defendants Nos. 2 and 2-A had sent an unaffirmed copy of their affidavit to the other side explaining that their *mehta* was still absent up-country. On March 10, the case being on the board for an *ex parte* decree was adjourned until the 17th, defendants Nos. 2 and 2-A being told to put in an affidavit explaining the delay. As the *mehta* did not arrive the affidavit of documents was thereafter affirmed by these defendants. A defendant is liable to have his defence struck out only when an order of the Court has not been obeyed, and even then the Court should direct that the defendant be called upon to show cause why his defence should not be struck out. That penalty will only be imposed, as has been pointed out in numerous cases, if it can be shown that the non-compliance with the order of the Court is due to wilful default. So that the summons and the order made thereon being inherently defective, it must necessarily follow that the case should never have been set down for an *ex parte* decree, and the order made on March 18, 1924, cannot be supported. Even on the merits it is difficult to see how the order was justified. It is quite true that defendants Nos. 2 and 2-A have been guilty of delay, but the excuse they gave was that their father having died they were not acquainted with the subject-matter of the suit and their *mehta* was up-country. So that it seems to me that there was certainly some excuse for the delay. Although the affidavit eventually filed could have been filed very much earlier, even assuming that they had disobeyed an order of the Court, we cannot agree with the learned Judge that this was one of the grossest cases of disobedience of the order of the Court, so that these defendants should suffer the extreme penalty of having their defence struck out. We think then that the appeal must be allowed and the order striking out the defence must be set aside. The decree must also be set aside and the hearing of the suit proceeded with.

Defendants Nos. 2 and 2A to pay the costs of the day on March 18 of defendants Nos. 3 and 4.

Defendants Nos. 2 and 2-A to get their costs of the appeal.

Coyajee, J.—I am of the same opinion.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 4 OF 1925.

March 2, 1925.

Present:—Mr. Baker, J. C.

BALWANTRAO AND OTHERS—DEFENDANTS—APPLICANTS

versus

FARID SAHEB—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Ground not in existence on date of decree.

No revision of a decree can be granted on any ground which was not in existence on the date of the decree.

Application for review of this Court's judgment, dated the 8th September 1924, in Miscellaneous Appeal No. 21 of 1924.

Messrs. *S. B. Gokhale*, *R. N. Padhye* and *M. B. Kinkhede*, R. B., for the Applicants.

Mr. *V. R. Pandit*, R. B., for the Non-Applicant.

ORDER.—This is an application for review of the judgment of this Court in Miscellaneous Appeal No. 21 of 1924, dated 8th September 24*. The facts will be found in the judgment and the principal ground urged for a review is that the decree in the suit on defendants' mortgage (Suit No. 85 of 1920) has been amended, so that the remarks in the last paragraph of the judgment are incorrect.

The judgment in question was delivered on the 8th September and the amendment in the decree was made on the 1st December 1924.

No revision can be granted on this ground in view of the Privy Council decision in *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (1) that a ground for revision must be in existence on the date of the decree.

Even if a revision could be granted on this ground, all that was said in the last paragraph of the judgment was as the appeal was only concerned with the *sir* land and as the decree does not give the defendants any rights in the *sir* land, s. 52 of the Transfer of Property Act had no application.

The decree as it then stood described the mortgaged property as half share of *Mouza* Saigaon *Thak* No. 574, excepting *sir* fields. The amendment consisted in striking out the word fields.

Even after the amendment the *sir* fields are not included in the decree, so the judgment of this Court is correct.

I do not propose to discuss other points, not mentioned in the judgment. The suit was remanded for trial on the merits after taking fresh pleadings and until those pleadings are taken it is obviously not possible to say whether they would raise points covered by the judgment of this Court or not.

The application is dismissed with costs.

Z K. *Application dismissed.*

(1) 24 M. 1; 27 I. A. 197; 4 C. W. N. 725; 10 M. L. T. 221; 2 Bom. L. R. 771; 7 Sar. P. C. J. 671 (P. C.)

*See 87 Ind. Cas. 283—[*Ed.*]

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 61 OF 1924.

March 3, 1925.

Present:—Sir Norman Macleod, KT., Cheif Justice, and Mr. Justice Coyajee.

KRISHNARAO PANDURANG BARVE —PLAINTIFF—APPELLANT

versus

BALVANT KESHAV PATIL— DEFENDANT—RESPONDENT.

Execution of decree—Instalment decree—Default of payment—Power of Court to relieve judgment-debtor from consequences of default.

An Executing Court cannot modify or vary the terms of a decree but it has power to relieve a party from the consequences of his not paying money within the exact time mentioned in the decree. It is entitled to weigh the equities and decide whether the judgment-debtor should or should not be relieved from the consequences of his failure to pay the money within the time limited by the decree. [p. 218, col. 2.]

Second appeal from the decision of the District Judge, Thana, in Appeal No. 239 of 1922, confirming a decree of the Subordinate Judge at Dahanu, in Darkhast No. 242 of 1922.

Mr. *G. N. Thakor* (with him Mr. *S. Y. Abhyankar*), for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—The plaintiff in this case obtained a decree in his favour in Suit No. 28 of 1916. The following amended decree was passed by the Appellate Court:—

"The decree of the lower Court is altered and it is ordered as follows:—The defendant should pay to the plaintiff the sum of Rs. 4,384-2-2 together with interest thereon by equal four annual instalments. The first instalment should be paid on the date the 5th of the month of June in the year 1919. Interest on each instalment should be paid at the rate of four per cent. from May 9, 1918, till payment of the whole amount. If he fails to pay the instalment, interest at the rate of six per cent. will continue to run from the dates on which the instalments will not be paid. The defendant should henceforth pay the Government assessment until delivery of possession to the plaintiff if occasion for such delivery to the plaintiff arises. If the plaintiff has paid the amount of Government assessment after May 8, 1918, the same should be recovered by the plaintiff from the defendant together with interest thereon at six per cent. from the date of the payment of the Government assessment. If the plaintiff henceforth paid the Government assessment, he should recover the same with interest thereon to

be calculated at the rate of six per cent. from the date of the payment of the Government assessment within one year. After all the instalments have been paid and after all the above mentioned amounts have been paid, the plaintiff should pass a sale-deed to the defendant if the latter requests the former to do so. He should execute the sale-deed after the defendant brings to him the stamped paper required for the sale-deed of Rs. 3,180. If the defendant fails to pay the abovementioned amounts within the period in which the last instalment is to be paid, the plaintiff is at liberty to claim back the possession of the property mentioned in the plaint. And the same is on the following condition:—The plaintiff is at liberty to claim the same if he pays before taking back the possession the amount which the defendant may have paid by way of principal out of Rs. 3,180."

The defendant paid Rs. 1,350 on March 11, 1921, and Rs. 1,061-4-2 on December 19, 1921. He made no further payment until after the presentation of the present *darkhast*, which the plaintiff took out on September 8, 1922, and with it he paid into Court Rs. 424-4-6 for payment to the defendant. He stated that since the defendant did not pay all the instalments within the date fixed for the last (fourth) instalments (June 1922) as directed by the decree, he was entitled to demand back possession of the suit property from the defendant on his recouping the defendant the amount paid by the defendant out of the principal sum of Rs. 3,180 in accordance with the terms of the decree.

The defendant thereafter deposited Rs. 3,158 into Court for payment to the plaintiff, and said that as that amount covered more than the amount due to the plaintiff under the decree the plaintiff might be paid the proper balances due to him under the decree out of the same, and his prayer for execution of the decree by recovery of possession of the property from the defendant should not be granted. The plaintiff's Pleader admitted that calculated at six per cent. per annum interest the amount now due to the plaintiff was Rs. 3,141-5-0, but he contended that since the defendant failed to pay off the instalments before the end of June 1922, the plaintiff was not bound to receive the said balance from the defendant, but was entitled to demand delivery of possession of the property under the terms of the decree.

The Trial Judge held that the decree left full discretion to the Court whether to grant or not to grant, on considerations of equity, the plaintiff's demand to recover possession of the property In these circumstances he thought it would be inequitable to grant the plaintiff's prayer to recover possession of the property. The plaintiff lost nothing if he received his full principal amount and interest thereon at six per cent. from the defendant as directed in the decree. He, therefore, directed that out of the amount of Rs. 3,158 deposited by the defendant into Court Rs. 3,141-5-0 be paid to the plaintiff as full satisfaction of the balance due to him under the present decree. The plaintiff should also recover his costs of this *darkhast* from the defendant, the amount of Rs. 424-4-6, which had been deposited by the plaintiff into Court for payment to the defendant to be paid back to the plaintiff.

In appeal the acting District Judge agreed with the Trial Court that as a Court of Equity relief could be granted to the defendant against the consequences of his default, especially as he had since paid into Court the full balance that had become due to the plaintiff under the terms of the decree.

In appeal to this Court it has been argued that this Court has no power to relieve a party to a decree against the consequences of his default in not observing the obligations imposed upon him by the decree. It is suggested that by relieving against default, the Court executing the decree would be modifying or varying its terms. Now it cannot be disputed that an Executing Court cannot modify or vary the terms of a decree. But it is going very much further to say that it has no power to relieve a party from the consequences of his not paying money within the exact time mentioned in the decree. To take one instance, a decree for redemption. Such a decree will state the amount payable by the mortgagor in order to redeem, and will give him a certain time within which to pay the amount. The decree will provide that in default of payment of the money within that time, the mortgagee will be at liberty to apply for a final decree for foreclosure or sale. It cannot be contended for a moment that if the period fixed by the decree has passed,

and the amount is not paid by the mortgagor, the Court, if the money is paid into Court after the period, cannot relieve him from the consequences of the default, and must grant the mortgagee a final decree for foreclosure or sale. So in this case the defendant undoubtedly was in default, and the plaintiff was entitled to come to Court and ask the Court to give him possession of the property. The Court then was entitled to weigh the equities and consider whether the defendant, as he had deposited everything that was due by him in Court, should be left in possession of the property, or whether the plaintiff should be entitled to refuse the offer of payment, and should be granted possessoin of the property itself. If the case had been argued on the footing that the equities were in favour of the plaintiff, we should have considered that the possibilities of the plaintiff's success would have been more favourable. But the plaintiff has gone too far in contending that the Court has no power whatever to consider the equities. We cannot agree with that. Both the lower Courts have considered the question whether the defendant is entitled to the indulgence he asked for. One consideration which evidently weighed with them was the fact that the property belonged originally to the defendant, and that the object of the decree was to enable him, if possible, to recover property which had passed away from him.

The next question would be whether the plaintiff was losing what he would otherwise have been entitled to in all fairness to him, if his prayer was not granted. But, as both Courts have found, the plaintiff was recovering the value of the property in full, he was getting interest at six per cent. thereon for the whole period, and was getting his costs of the *darkhast*. So really there is no particular reason why the Court should find that the balance of the equities was in his favour

We think, therefore, that the decision of the Court below was right. The appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 900 OF 1925.

May 14, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BHIKHI MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEBI SAHAI—PLAINTIFF—RESPONDENT.

Agra Pre-emption Act (XI of 1922), ss. 5, 19—Transfer of Property Act (IV of 1882), s. 52—Pre-emption—Sale of abadi *plot, whether liable to pre-emption—*Lis pendens, *doctrine of, applicability of, to suit for pre-emption—Re-transfer by vendee in favour of vendor during pendency of suit, effect of.*

There is nothing in the provisions of the Agra Pre-emption Act which exempts a sale of *abadi* plots situated in a *mahal* or village from pre-emption. [p. 219, col. 2.]

The doctrine of *lis pendens* applies as much to pre-emption suit as to other suits. [p. 220, col. 1.]

Ghasitey v. *Gobind Das*, 30 A. 467; 5 A. L. J. 477; A. W. N. (1908) 221, followed.

Section 19 of the Agra Pre-emption Act must be read as subject to the general provisions of s. 52 of the Transfer of Property Act which embody the doctrine of *lis pendens*. The effect of the applicability of the doctrine of *lis pendens* to a suit for pre-emption is that a plaintiff's right to pre-emption does not cease to exist merely because during the pendency of the suit the vendee has made a re-transfer of the property to the vendor. [*ibid.*]

Second appeal from a decree of the District Judge, Meerut, dated the 31st January 1925.

Mr. *K. K. Verma*, for the Appellants.

JUDGMENT.—This case is up for admission under O. XLI, r. 11 of the C. P. C. It is a case to which the Agra Pre-emption Act (U. P. Act XI of 1922) applies, and two points are raised.

In the first place it appears that the property which was sought to be pre-empted consisted of two plots in the *abadi*. The Courts below have held that under the Pre-emption Act these plots are liable to be pre-empted.

We can find nothing in the provisions of the Agra Pre-emption Act which lends support to the argument that plots situated in the *abadi mahal* or village cannot be pre-empted. Section 5 of the Act declares that a right of pre-emption shall be deemed to exist in *mahals* or villages in respect of which any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom, contract or declaration importing a right of pre-emption. Certain properties, by other sections of the Act, are exempt from pre-emption but we can find nowhere in the Act that the *abadi* plots which are

situated in a *mahal* or village are so exempt. In our opinion, therefore, it cannot be contended that there is no right of pre-emption in respect of plots situated in the *abadi* of a *mahal* or village.

Another point is raised and in this connection we are referred to the provisions of s. 19 of the Act. It appears that after the suit was brought the vendees retransferred the property to the vendor and it is claimed that for that reason the suit for pre-emption should have been dismissed.

It has often been ruled by this Court that the doctrine of *lis pendens* applies as much to pre-emption suits as to other suits and in this connection we may cite the case reported as *Ghasitey* v. *Gobind Das* (1).

It is said, however, that s. 19 of the Pre-emption Act declares that no decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree. In this case it is said the plaintiff's right of pre-emption had ceased to subsist since the date on which the vendee re-transferred to the vendor and, therefore, it is said no decree for pre-emption can be passed under the provisions of this section.

We think that this section must be read as subject to the general provisions of s. 52 of the Transfer of Property Act which embody the doctrine of *lis pendens*, and we are not prepared to hold that the plaintiff's right to pre-emption ceases to exist merely because while the suit is pending the vendee has made a re-transfer to the vendor. The right in our opinion does still subsist by reason of the principles laid down in s. 52 of the Transfer of Property Act.

These are the only two points which are raised before us on behalf of the appellants. We decide them against the appellants and dismiss this appeal under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

(1) 30 A. 467; 5 A. L. J. 477; A. W. N. (1908) 221.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 34 OF 1923.

February 24, 1925.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

KONDI SAVLA BACHAL—PLAINTIFF—APPELLANT

versus

BANACHAND CHENIRAM MARWARI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Suit against* benamidar—*Beneficial owner, whether bound.*

As the result of a proceeding by or against a *benamidar* the person beneficially entitled is fully affected by the rules of *rēs judicata*. [p. 221, col. 1.]

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.), followed.

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 459 of 1921, modifying a decree of the Joint Subordinate Judge at Satara, in Civil Suit No. 555 of 1920.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *T. N. Valavalkar*, for the Respondent.

JUDGMENT.—The plaintiff sued to recover possession of the plaint property with mesne profits, alleging that on May 23, 1918, he purchased it at a Court auction for Rs. 530 in *Darkhast* No. 654 of 1917 in execution of the decree obtained by him in Suit No. 887 of 1913.

That suit was filed on a mortgage given by one Krishna Appa, against his widow Vithabai and one Patlu Babaji.

The plaintiff obtained a sale certificate dated August 15, 1918. The defendant claimed that he had obtained a decree in Suit No. 649 of 1911 against Vithabai and in execution of the decree the property was sold at auction on February 1, 1913, and was purchased by Patlu *bin* Babaji *benami* for the defendant; that since then he had been in possession; that the plaintiffs collusively obtained the decree against Patlu in 1913; and that he was not bound by it. The Trial Court held that the defendant had not proved that Patlu Babaji was his *benamidar*, that the plaintiff had proved his title to the property in suit, and, therefore, passed a decree for possession in favour of the plaintiff.

In appeal it was held that Patlu was defendant's *benamidar*. The next point argued was that the plaintiff, who knew this avoided bringing defendant on the record in the

previous suit, and did so to evade the suit being defended, and that the proceedings should on that account be re-opened. The Judge said " I do not think any material is shown to make it necessary that the whole suit proceedings, which no doubt were *ex parte* should be re-opened. " He then held that the decree in Suit No. 887 of 1913 did not bind the defendant, so that the decree and the sale proceeding in *Darkhast* No. 654 of 1917 had not the effect of extinguishing defendant's equity of redemption. He passed, therefore, a redemption decree directing the defendant to pay to the plaintiff within six months of the date of the decree the amount due on the decree in Suit No. 887 of 1913, with interest at six per cent.

The plaintiff has appealed, and the question now is whether the defendant is bound by the decree against Patlu in Suit No. 887 of 1913. The appellant relies upon the decision of the Privy Council in *Gur Narayan* v. *Sheo Lal Singh* (1). Their Lordships said at page 574* :—

" So long, therefore, as a *benami* transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed, the *benamidar* has no beneficial interest in the property or business that stand in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the *benamidar* in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the *benamidar*, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action ; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him."

Applying the decision in that case to the facts of this case, the defendant on whose behalf Patlu purchased the property at a Court sale in execution of the decree in Suit No. 651 of 1911 was bound by the decree passed in favour of the plaintiff in his suit brought against Patlu. He cannot, therefore, resist the plaintiff who is demanding possession as the auction-purchaser. Nor can he claim to be entitled to redeem the property since the plaintiff's decree and the sale of the property in execution extinguished that right. We allow the appeal and restore the decree of the Trial Court with costs throughout.

Z. K. *Appeal dismissed.*

(1) 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

*Page of 46 C.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 252 OF 1924.

April 27, 1925.

Present :—Mr. Dalal, J. C.

KALKA SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

BISHUNATH SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease—"Perpetual," use of, effect of—Heritable rights, whether created—Specific Relief Act (I of 1877), s. 42—Suit for declaration that defendant is not perpetual lessee, whether maintainable—Jurisdiction of Civil Court—Co-sharers—Gift of rent-free tenure by one co-sharer—Partition—Gift held to be binding upon all co-sharers—Decision of Revenue Court, whether can be questioned.

The mere use of the word "perpetual" in a lease does not transfer a heritable interest to the lessee. [p. 223, col. 1.]

Aziz-un-nissa v. *Tasadduq Husain Khan*, 23 A. 324; 11 M. L. J. 160; 28 I. A. 65; 5 C. W. N. 569; 3 Bom. L. R. 307 (P. C.), followed.

A lease was described as a perpetual lease given for perpetual cultivation but there were no words indicating future generations. It was stated in the lease that there would be no ejectment of the tenants mentioned in the lease and the protection was not extended to the successors-in-interest of the tenants :

Held, that the lease did not confer a heritable interest on the lessee. [p. 223, col. 1.]

Tirbhuwan Dat v. *Muhammad Abdul Hasan Khan*, 33 Ind. Cas. 264; 2 O. L. J. 746, relied on.

A perpetual lease is a transfer of a proprietary right and when a person holding under a lease claims that he is a perpetual lessee a declaration that he does not hold as such lessee can be obtained against him in the Civil Court. [p. 223, col. 2.]

A co-sharer granted a rent-free tenure to certain persons. During partition proceedings between the co-sharers there was a dispute as to whose divided share of the property should bear the burden of the gift of the rent-free tenancy made by one of them. It was decided by the Revenue Court that the burden should be borne rateably according to their shares by all the proprietors and the method of partition contained a direction to that effect. In a subsequent suit between the co-sharers and the tenure-holder :

Held, that the gift having been held to be binding on all the proprietors by the Revenue Court, the defendants, although they were not parties to the proceeding before the Revenue Court, were entitled to take advantage of the decision of the Revenue Court and the question could not be re-opened. [p. 222, col. 2; p. 223, col. 1.]

Appeal against a decree of the Additional Subordinate Judge, Sultanpur, dated the 18th March 1924, affirming that of the Munsif, Amethi, Sultanpur, dated the 18th March 1924.

Mr. *H. K. Ghose*, for the Appellants.

Messrs. *Gokaran Nath Misra* and *Ganpat Sahai*, for the Respondents.

JUDGMENT.—These are six second appeals for decision here arising out of six separate suits. The suits were filed by different members of a family, three for a declaration and three for possession of certain plots of land. The declaration sought was that the defendants were not perpetual lessees of certain plots of land as they put themselves forward to be. The corresponding suits relating to the different appeals are as follows:—

Appeals No. 252 from Suit No. 186 for possession by two brothers Bishunath and Ram Bahadur.

Appeal No. 257 from Suit No. 187 of the same plaintiffs for declaration.

Appeal No. 253 from Suit No. 184 of Lahori Singh for possession.

Appeal No. 254 from Suit No. 189 of the same plaintiff for declaration.

Appeal No 255 from Suit No. 188 for declaration by Jaipal Singh

Appeal No 256 from Suit No. 185 by the same plaintiff for possession.

The causes of action arose under the following circumstances:—One Gobind Bakhsh Singh was uncle's son of Lahori Singh, Jaipal Singh and Mahesh Narain Singh who are brothers. Mahesh Narain Singh's sons are the plaintiffs. Bishunath and Ram Bahadur. They were brought on the record on the death of Mahesh Narain Singh during the pendency of the suit. The defendants claimed that they held half the land as rent free grant from Gobind Bakhsh Singh and the rest as perpetual lessees from the same person under two deeds dated 19th April 1874. The deed of gift and the deed of lease were executed by Gobind Bakhsh Singh in favour of Sheopal Singh and Bhawanipalat Singh. They are both dead and the defendants are the two sons and one grandson of Sheopal Singh and are at present in possession of the plots in suit. Even since the documents were executed by Gobind Bakhsh Singh the defendants' predecessors and after them the defendants have been in possession of the plots in suit.

At the time of the Settlement in 1893 Mahesh Narain Singh and his brothers objected that the gift and lease were not granted by them so the names of the defendants' ancestors should not be entered in the village records. This objection was dismissed on 1st December 1893 (papers Exs. A-7 and A-8).

Subsequently there was a partition between Gobind Bakhsh's sons and Mahesh Narain and his brothers. During partition proceedings there was a dispute as to whose divided share of the property should bear the burden of the gifted and the leased land. It was definitely decided by the Revenue Court on 15th February 1912 that the burden should be borne rateably according to the shares by all the proprietors and the method of partition contained a direction to that effect (See Ex. A-20 and A 24). The order of the partition officer dated 15th February 1912 was passed after some litigation in his Court and in the Appellate Court. (See orders of 12th June 1911 and 15th August 1911 Ex. A-17 and A-13 respectively).

Both the subordinate Courts held that the deed of gift and the lease were not binding on the plaintiffs. The defendants have, therefore, appealed. Apart from the interpretation of the two documents, I do not agree with the opinion of the subordinate Courts. In my opinion the proceedings in partition made both the deeds binding on the plaintiffs. There was a contest between Mahesh Narain and his brothers on one side and Gobind Bakhsh Singh's sons on the other, as to who should bear the burden of the lease and the deed of gift and it was definitely decided that the burden should be borne rateably. The plaintiffs attack the two transfers on the ground that Gobind Bakhsh had no authority to make those transfers on behalf of the plaintiffs. The Revenue Court, sitting as a Civil Court, however, decided against them on this point. It will be unfair to re-open the question now because the defendants would not be able to get any compensation from Gobind Bakhsh's sons for breach of the agreements because so far as those sons are concerned they had it decided in

their favour that the other co-sharers also were liable to the burden of the lease and the gift. The learned Counsel for the respondents quoted on the subject *Angad Singh* v. *Janki Kunwar* (1), and a decision of the Board of Revenue reported in *Umed Ali* v *Anwar Husain* (2). It was decided there that partition between superior proprietors did not affect the rights of under-proprietors. The case here is different. Here the genuineness of the documents is admitted and the question is as to which of the superior proprietors should bear the burden created by those documents. At partition between the superior proprietors this is an essential question of decision by the partition officer when he prepares the method of partition, so the decision of the partition Court would be binding on the co-sharers. It is true that the defendants were not parties to the partition; but even so their rights were determined in the partition and it was settled there that they were entitled to hold under the documents not only from Gobind Bakhsh Singh and his descendants but from Mahesh Narain and his brothers also.

From that point of view the suits as regards the deed of gift cannot succeed and must be dismissed.

The other suits raise another point of law as to whether under the deed of lease Sheopal Singh and Bhawanipalat Singh got any heritable right. The deeds were read out to me in Court by the Reader and it is clear that no heritable rights were transferred to Sheopal and Bhawanipalat Singh. As pointed out by their Lordships of the Privy Council in *Aziz-un-nissa* v. *Tasadduq Husain Khan* (3), the mere use of the word 'perpetual' does not transfer heritable interest. In the lease the description of the document is given as perpetual lease given for perpetual cultivation but there are no words indicating future generations. When it is stated that there will be no ejectment, it is specially stated that the tenants whose names have been mentioned above shall not be ejected. It is not stated that those tenants and their successors-in-interest shall not be liable to ejectment. The same view was taken by the Board of Revenue in *Tirbhuwan Dat* v. *Muhammad Abdul Hasan Khan* (4), following the ruling of the Privy Council quoted above.

The appellants' learned Counsel contended that such a declaration is not to be granted by a Civil Court. The reason for such an objection is not obvious A perpetual lease is a transfer of proprietary right and it is difficult to understand why a declaration against the person claiming such rights should not be sought in the Civil Court.

In the result I dismiss Suits Nos. 186, 184 and 185 with costs of all the Courts. In Suits Nos. 187, 189 and 188 I pass a decree granting the respective plaintiffs a declaration that the defendants are not perpetual lessees of the plots of land which they are stated to be holding in their respective plaints and that the defendants have not acquired any rights in virtue of the lease of 19th April 1874 other than those of a tenant. The plaintiffs shall receive costs of all Courts of these suits.

Z. K. *Appeal No. 252 dismissed.*

(1) 2 Ind. Cas. 273; 12 O. C. 97.
(2) 34 Ind. Cas. 733; 3 O. L. J. 232.
(3) 23 A. 324; 11 M. L. J. 160; 28 I. A. 65; 5 C. W. N. 569; 3 Bom. L. R. 307 (P. C.).

(4) 33 Ind. Cas. 234; 2 O. L. J. 746.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 86 OF 1921.

March 5, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GHANSHIRAM BALURAM—APPLICANT

versus

MISRILAL CHUNILAL—OPPONENT.

Limitation Act (IX of 1908), Sch. I, Art. 164—Ex parte *decree, application to set aside—Due service of summons—Limitation, commencement of.*

An application by a defendant, who was duly served with the summons, to set aside an *ex parte* decree must be made within thirty days of the date of the decree. The Court has no jurisdiction to entertain an application in such a case made more than thirty days after the decree. No question of the knowledge of the defendant of the date of the decree arises. [p. 224, col. 1.]

Application against an order of the Joint Subordinate Judge, Dhulia, in Suit No. 276 of 1919.

Mr. *P. V. Kane*, for the Applicant.

Mr. *K. H. Kelkar*, for the Opponent.

JUDGMENT.—The present applicants filed Suit No. 40 of 1919 in the First Class Subordinate Judge's Court at Dhulia against the present opponent Misrilal Chuni-

lal and another person, against whom afterwards the claim was withdrawn. Summons was served on the opponent on February 10, 1919. He did not appear at the hearing though duly served, and an *ex parte* decree was passed against him on April 15, 1919, for Rs. 2,366-8-0. The opponent then filed Suit No. 276 of 1919 on July 16, 1919, in the Dhulia Court against the present applicants for a declaration that the *ex parte* decree obtained by the petitioners against him in Suit No. 40 of 1919 was obtained by fraud and mis-representation, and that he came to know of the decree on July 4, 1919. Two preliminary issues were raised (1) whether plaintiff (Misrilal) proved that the service of summons on himself as defendant in Suit No. 40 of 1919 was effected fraudulently as alleged; (2) if not, then whether plaintiff can be allowed to prove that the decree in Suit No. 40 of 1919, was obtained by using fabricated documents and by suppression of evidence. The Court held that a finding on the first issue was not necessary and on the second it held that the plaintiff could be allowed to prove that the decree in Suit No. 40 of 1919 was obtained by using fabricated documents and by suppression of evidence.

The Judge then went on to consider whether the decree had been obtained by using fabricated documents and by suppression of evidence, and although he found it was not necessary to find whether the summons was fraudulently served, he did go into that question and concluded that no fraud could be brought home to the present defendant in respect of the sending of the summons to Falodi by registered post. The present plaintiff, after he was served with the summons by registered post, wired to the Court for an adjournment on the ground as he stated, that there was a marriage ceremony at his house and that further he was engaged in a criminal matter. The Judge further found that there was no fraud or mis-representation on the part of the present applicants. He then continued:

"If the suit were treated as an application to set aside the *ex parte* decree, the plaintiff would be entitled to have it set aside. There is, however, no specific prayer to that effect. I, therefore, allow plaintiff an opportunity to say whether he wishes to treat this suit as an application and to be decided accordingly."

The present suit was instituted within a month after plaintiff got knowledge of the decree in Suit No. 40 of 1919. The plaintiff then applied that the suit should be treated as an application to restore the suit to the file by setting aside the *ex parte* decree. That was granted and costs were directed to abide the result. That was by itself an extraordinary order to make, because it would mean that if the applicants eventually lost the suit, they would have to pay the costs of their successful defence against the opponent charging them with fraud. But the real question is whether the Judge had jurisdiction to treat the plaint in the suit as an application to set aside an *ex parte* decree under O. IX. It was never suggested that the opponent, if he could not substantiate the charge of fraud, had not been served with summons. The Court never considered that question, and it had never been raised by the opponent in those proceedings. But the Judge considered the time from which limitation started as the date on which the plaintiff got knowledge of the decree in Suit No. 40 of 1919. That was a wrong conclusion, considering the Judge must be taken to have held in the absence of fraud, that the summons was duly served. He said :—

"The present plaintiff actually wired to the Court for an adjournment. This fact shows that the present plaintiff was served with the summons in the suit and accepted the service, and the Court was not misled by any representation on the part of the defendant."

Therefore, it is clear that limitation started from the date on which the decree was passed. The Judge, therefore, had no jurisdiction to entertain the application after thirty days. This Rule must be made absolute and the order of the lower Court discharged with costs throughout on the opponent.

Z. K. *Rule made absolute.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION
No. 140 OF 1923.
March 5, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

CHHOTALAL MOHANLAL—APPLICANT
versus
AMBALAL HARGOVAN—OPPONENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Dismissal of suit in default—Plaintiff arriving late in Court—Restoration—Practice.

As a rule of practice in the Subordinate Courts of the Bombay Presidency, when a party to a suit arrives late in Court and finds that his suit or application has been dismissed in default before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred by reason of his default by the opponents.

Application against an order of the District Judge, Ahmedabad, in Appeal from Order No. 40 of 1922, confirming that of the Subordinate Judge, Kaira, in Miscellaneous Application No. 9 of 1922.

Mr. *K. N. Koyajee*, for the Applicant.

Mr. *P. B Shingne*, for the Opponent.

JUDGMENT.—The applicant before us was the plaintiff in a suit pending in the Court of the First Class Subordinate Judge of Kaira. It was called on for settlement of issues on June 15, 1922. At that time the applicant was not present in Court, and the suit was dismissed for default. He came into the Court about two hours later and told the Judge that his train was late on account of an accident, and also pointed out the difficulty of getting tongas. The applicant was asked by the Court why he did not wire from Mehmadabad. The applicant replied that he did not do so as he was to come. He adduced evidence that tongas were not available; that the train was late; and that he had gone into the Mehmadabad Station to wire to the Court. An application was made thereafter (Miscellaneous Application No. 9 of 1922), to restore the suit to the Board. The Judge considered the evidence of the applicant was untrustworthy, and that even if the train by which the applicant was travelling had reached Mehmadabad Station in time, he would not have been able to reach the Court before Court hours. The applicant should have started on the preceding day. He, therefore, rejected the application with costs.

In appeal the District Judge said :—

"In the present case the summons had been issued for the settlement of issues. Neither the plaintiff nor his Pleader put in an appearance. The absence of the plaintiff attracted the consequences provided in O. IX, r. 8. There was, therefore, nothing irregular in the dismissal of the suit under that rule. The appeal was dismissed under O. XLI, r. 11, of the C. P. C."

The applicant has come to this Court in revision. It is true that there was nothing irregular in the dismissal of the suit, the mistake occurred in rejecting the application to restore the suit to the file. We have more than once laid it down as a rule of practice to be observed in the Subordinate Courts that when a party arrives late before the Judge, and finds that his suit or application has been dismissed before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred by reason of his default by the opponents. The proper order, therefore, for the Subordinate Judge to have made was to grant the application and make the applicant pay the costs. That is the order which we make now. As the applicant was in default, there will be no order as to costs in the lower Court and in this Court.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 48 OF 1921.
May 19, 1925.

Present:—Mr. Dalal, J. C., and Mr. Simpson, A. J. C.

K. B. Sheikh MAQBUL HUSAIN, C. I. E., AND OTHERS—APPLICANTS
versus
ESTATE OF CH. SHAFIQ-UZ-ZAMAN THROUGH THE DEPUTY COMMISSIONER OF BARA BANKI AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Interference, when justified—Discretion of Court.

Under the provisions of s. 115 of the C. P. C. interference by the High Court by way of revision is discretionary. Under no circumstance of want or wrong assumption of jurisdiction or of illegality or irregularity is the High Court bound to interfere even though the decision which is sought to be revised may be in conflict with any principle of law. The Court's interference will be influenced by the justice of the

case and not by any mere irregularity, want of jurisdiction or wrong pronouncement on a point of law by a Subordinate Court. [p. 227, cols. 1 & 2.]

[Case-law referred to.]

Revision against an order of the District Judge, Lucknow, dated the 19th February 1925.

Messrs. *E. R. Kedvai*, *M. H. Kedwai* and *Niamat Ullah*, for the Appellants.

Messrs. *Gokal Prasad*, *Bisheshar Nath*, *Ali Zaheer*, *Ishri Prasad* and *Nand Lal Tandon*, for the Respondents.

JUDGMENT.—This is an application in revision from an order of the District Judge of Lucknow, dated 19th February 1925. The applicants are trustees appointed by one Shafiq-un-zaman on 18th August 1924 for the management of a trust created by him on 30th January 1912. An order of adjudication was passed in favour of Shafiq-uz-zaman on 27th January 1914 by the District Judge of Lucknow as Judge of the Insolvency Court. The Deputy Commissioner of Bara Banki was appointed a Receiver and all the property of Shafiq-uz-zaman vested in the Receiver who is at present in possession thereof. The name of Sir Henry Stanyon has also been mentioned as that of a Receiver but it appears that he is only concerned in carrying out litigation connected with the management of the property by the Deputy Commissioner of Bara Banki. Prior to the order of adjudication, Shafiq-uz-zaman had executed a deed of trust on 30th January 1912, appointing certain trustees. Those trustees were discharged by the District Court on their application on 12th August 1912. It will, therefore, be seen that the trust was not operative at the date of the Insolvency Court's order of adjudication.

Under the trust the beneficiaries were most of the creditors of Shafiq-uz-zaman with a residue to his son Sharaf-uz-zaman. The trust deed also provided for monthly allowances to the author of the trust and to his wife of Rs. 400 and Rs. 200 respectively.

The ultimate beneficiary Sharaf-uz zaman sued for a declaration that the trust property was not liable to be taken possession of by the Receiver and for the appointment of new trustees. As the suit was instituted in the Court of the Subordinate Judge who had no jurisdiction to appoint trustees under the Trusts Act II of 1882 no attention was paid to that relief. The declaratory suit was dismissed by one of the Additional Districi Judges of Lucknow, to whom it was transferred for hearing. On appeal to this Court, a declaration was granted to Sharaf-uz-zaman that the trust was still existing. No declaration was granted as to the non-liability of the property to be taken over by the Receiver. It was observed at page 310* of the judgment [*Sharaf-uz-zaman* v. *Henry Stanyon* (1)]: "If Sharaf-uz-zaman obtains a declaration in this suit that the trust is still existing his proper course will be to apply to the District Court under s. 74 of the Trusts Act for the appointment of a trustee. We have little doubt that he will be well advised to ask for the appointment of the present Receiver a course which his plaint shows he is not unwilling to adopt. These remarks of course are subject to the possibility of the trust deed being hereafter declared void by the Insolvency Court on the application of the Receiver under s. 53 of the Provincial Insolvency Act V of 1920."

The Receiver took proceedings under s. 53 and the trust deed was declared void by the Insolvency Court but that order was set aside by this Court and the trust deed was maintained [*Sharaf-uz-zaman* v. *Deputy Commissioner, Barabanki* (2).] This judgment was delivered on 14th April, 1924, and as noticed above the applicants were appointed trustees four months later by the author of the trust.

These new trustees applied to the District Court under s. 3 of the Indian Trusts Act for delivery of the insolvent's property to them after removing it from the control of the Receiver who was the Deputy Commissioner of Bara Banki as already observed, The other prayers were that the money in the hands of the Receiver may be made over to the trustees, that the Receiver be called upon to furnish accounts for the period of his possession, that he be directed to refund to the trustees all payments made by him, even though made under the orders of the Insolvency Court, to the creditors of Shafiq-uz-zaman and to any other persons, and that all persons, who may have received any moneys from the Receivers, even though under the orders of the Insolvency

(1) 70 Ind. Cas. 253: 25 O. C. 291: (1923) A. I. R. (O.) 80: 10 O. L. J. 491.

(2) 79 Ind. Cas. 888: 1 O. W. N. 201: 10 O & A. L. R. 514; 11 O. L. J. 599; (1925) A. I. R. (O.) 28, 27 O. C. 392.

*Page of 25 O. C.—[*Ed.*]

Court, be called upon to refund all those sums to the petitioners. It will be noticed how inequitable some of the prayers of the trustees are. Action was definitely taken in the District Court under the Trusts Act and the jurisdiction of that Court was invoked as the principal Civil Court of original jurisdiction in Lucknow and not as an Insolvency Court.

The application was opposed by the Receiver and by many of the principal beneficiaries under the deed of trust who are the main creditors of the estate. The learned Judge held that the applicants were not properly appointed trustees because after the appointment of the Receiver the author of the trust, who was declared an insolvent, had no right to appoint new trustees under s. 73 (*b*) of the Trusts Act. The decision of this question will depend upon the definition of the word "property" for the purposes of the Provincial Insolvency Act V of 1920, s. 2 (*i*) (*d*). The learned Judge held that the power of appointment to the trust which was partly for the benefit of the insolvent was property which vested in the Deputy Commissioner of Bara Banki on his appointment as Receiver by the Insolvency Court. The learned Judge then proceeded further and gave reasons why he presiding in the Court dealing with trusts, can settle the question on broader grounds. In his opinion the Court of Insolvency was *de facto* trustee and there was no necessity for a Civil Court dealing with a trust to remove that trustee and make over possession of the trust property to other trustees. A mistake as to the basis of the applicants' relief was wrongly attributed to the learned District Judge. As we have pointed out more than once above, the applicants took action under s. 11 of the Trusts Act and the mistake lies at the door of the applicants when their Counsel argued here that the application was made under s. 4 of the Provincial Insolvency Act. The application was dismissed and the applicants have come here on revision.

Under the provisions of s. 115, C. P. C., the interference by this Court is discretionary. The power is one of superintendence by the High Court. Under no circumstance of want or wrong assumption of jurisdiction or of illegality or irregularity is this Court bound to interfere even though the decision which is sought to be revised may be in conflict with any principle of law. In *Bhoyrub Chunder Doss* v. *Wajedunnissa Khatoon* (3), the following observation was made by the Calcutta High Court at page 236*: "As the order of the Judge in this matter, although passed without jurisdiction, was really a right order, and had merely the effect of getting rid of the decision of the First Court which was wrong, we think we ought not to make any order in this case." Similarly as regards illegalities and irregularities committed by the lower Court, the Calcutta High Court [*In re Basharat Ali Chowdhry* (4) and the Bombay High Court in *Ramrao* v. *Babaji* (5)] declined to interfere when the order of the lower Court had done substantial justice between the parties and was the most equitable one that could be passed under the circumstances of the different cases. As far back as 1884, West, J., observed in a revision matter regarding the exercise of jurisdiction by a Subordinate Judicial Officer: "This was irregular, as in the exercise of his judicial functions he was bound to be governed by the law as he understood it, or as it had been expounded by superior judicial authority, not as it was understood or expounded by unjudicial persons. But the present is a case in which the extraordinary jurisdiction of this Court is invoked, and we must guard against its being abused, merely because the *mamlatdar* has fallen into a formal error." *Nana Bayaji* v. *Pandurang Vasudev* (6). In *Abdul Sadiq* v. *Abdul Aziz* (7), a Bench of the Allahabad High Court refused to interfere by way of revision with the order of a Subordinate Court which, though wrong in principle, appeared to be right in its results. The Court's interference will be influenced by the justice of the case and not by any mere irregularity, want of jurisdiction or wrong pronouncement on a point of law by a Subordinate Court.

There are abundant reasons in this case why we should not interfere by way of revision. The property of the insolvent is being well-managed at present by the Deputy Commissioner of Bara Banki and the beneficiaries under the trust derive great advantage from this good management. Four of the newly appointed trustees,

(3) 6 C. L. R. 234.
(4) 24 C. 133; 12 Ind. Dec. (N. S.) 754.
(5) 20 B. 630; 10 Ind. Dec. (N. S.) 988.
(6) 9 B. 97; 5 Ind. Dec. (N. S.) 65.
(7) 21 A. 152; A. W N. (1899) 1; 9 Ind. Dec. (N. S.) 806.

*Page of 6 C. L. R.—[*Ed.*]

who are the applicants here, are admittedly busy men who have their own load of daily toil. It was represented here that the applicant No. 3 Chaudhri Ehsan Husain will manage the property. It appears that by common consent it will be left to that gentleman to carry out the provisions of the trust and the other trustees have been induced to give the weight of their influential names out of regard for the insolvent and in a vain hope of doing a good turn to his son. Under no circumstances could this gentleman prove as efficient a manager as the Deputy Commissioner of Bara Banki. Except the beneficiaries to whom the residue is to go all the other beneficiaries are firmly opposed to a change of the management.

Another matter pointed out by the lower Court relates to the execution of a decree by a secured creditor, the Bank of Upper India in liquidation. The decree is at present of the value of about 17 lacs of rupees and if the Deputy Commissioner of Bara Banki is removed from the management steps will be promptly taken by the creditor to put the Deputy Commissioner again into possession of the property in execution proceedings under Sch. III of the C. P. C. Any order, therefore, putting the applicants in possession of the property will not only be ill-advised but will be ineffective ultimately.

Upon a misunderstanding of the lower Court's judgment an argument was advanced to indicate that that Court had acted in its capacity as an Insolvency Court in this matter. This is not correct. What the learned Judge said was that sitting as a Court charged with decision in trust matters, he should not pass orders which would not be acceptable to him as Judge of the Insolvency Court. There can be no doubt that the proceedings were initiated, continued and finally decided as those under the Trusts Act. The argument, therefore, that an appeal lay from the lower Court's order under s. 75 (2) of the Insolvency Act fails.

We dismiss this application but having regard to the circumstances of the case we direct that the taxable costs of the applicants and of the Receiver in insolvency in both Courts shall be paid out of the property in the possession of the Receiver and shall be the first charge thereon.

Z. K. *Application dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 643 OF 1923.

February 27, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

MULCHAND MANAJI MARWADI—DECREE-HOLDER—APPELLANT

versus

JAMANBI ABUDULKADIR SAHEB KAJI—JUDGMENT-CREDITOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Application for payment of money, whether step-in-aid of execution—Oral application—Presumption.

An application by a decree-holder for the payment to him of money lying in Court as a result of a sale in execution of the decree is an application to the Court to take a step-in-aid of execution of the decree within the meaning of cl. (5) of Art. 182 of Sch. I to the Limitation Act and operates to extend limitation. Such an application need not be in writing and may be made orally. [p. 228, col. 2.]

Bapuchand Jethiram Gujar v. *Mugutrao*, 22 B. 340; 11 Ind. Dec. (N. S.) 809, followed.

Where the facts of a particular case can form the foundation for a fair presumption that an application was made, the Court would be entitled to presume that such an application was made. [p. 229, col. 1.]

Trimbak Bapuji v. *Kashinath Vidyadhar*, 22 B. 722; 11 Ind. Dec. (N. S.) 1064. followed.

Second appeal from the decision of the District Judge, Bijapur, in Appeal No. 39 of 1922, confirming an order of the Subordinate Judge, Bijapur, in *Darkhast* No. 117 of 1921.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr *H. B. Gumaste*, for the Respondents.

JUDGMENT.—Two questions arise in this second appeal; (1) whether an application to the Court to pay out money in satisfaction of a decree can be a step-in-aid of execution; (2) whether on the facts of this case the Court can presume that an oral application was made by the judgment-creditors on April 13, 1918, for payment out to them of the sale-proceeds of the property deposited in Court. It was decided in *Bapuchand Jethiram Gujar* v. *Mugutrao* (1) that an application by a judgment-creditor for the payment to him of money, which has been paid into Court on his account in execution of his decree, is an application to the Court to take a step-in-aid in execution of the decree within the meaning of Art. 179 of Sch. II of the Indian Limitation Act. We see no difference between money paid into Court to satisfy a decree and money lying in Court as a result of a sale in execution of the decree. We think, therefore, that if an application for payment out was made,

(1) 22 B. 340; 11 Ind. Dec. (N. S.) 809.

it was a step-in-aid of execution. Such an application need not be in writing. The question is whether we could presume that such an application was made on April 13, 1918. On that day the Pleader of the judgment-creditors was present. A report had been received from the *nazir* that Rs. 650, sale-proceeds of property sold, were with him. Exhibit 54 was a list of bidders at auction. Exhibit 53 was a proclamation of sale, and Ex. 55 was the memo of publication. The *nazir* was ordered to hand over the money to the Pleader for the judgment-creditors and report having done so. This order was passed below Ex. 52 which was the warrant of sale issued on January 18. It is quite true that the *roznama* does not state in so many words that the Pleader of the judgment-creditors made an application to the Court that the sale-proceeds should be paid out to him, and it is contended for the respondent that as the order made by the Court could have been made without such an application, one was not entitled to presume that an application was made by the Pleader for the judgment-creditors. Against this the appellant relies on *Trimbak Bapuji* v. *Kashinath Vidyadhar* (2), where it was held that where an order made in aid of execution is of such a nature that the Court would not have made it without an application by the judgment-creditor it may be presumed that due application had been made for it. We would prefer to go further and say that where the facts of a particular case can form a foundation for a fair presumption that an application was made, then the Court would be entitled to presume that it was made. On the facts disclosed in the *roznama* of April 13, 1918, we think it is fair to presume that the Pleader of the judgment-creditors made an application to the Court that the sale-proceeds should be paid out to him. The present *darkhast*, which was presented on April 13, 1921, would then be in time.

We, therefore, allow the appeal and direct the *darkhast* to proceed. The appellants to have their costs in this Court and in the lower Appellate Court. Costs in the Trial Court to be costs in the *darkhast*.

Z. K. *Appeal allowed.*

(2) 22 B. 722; 11 Ind. Dec. (N. S.) 1064.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1672 OF 1923.

February 6, 1924.

Present:—Mr. Justice Moti Sagar.

KESHO DAS—PLAINTIFF—APPELLANT

versus

TULSI DASS—DEFENDANT—RESPONDENT.

Champerty—Public policy—Unconscionable bargain.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being opposed to public policy. Indeed cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression that a suitor who had a just title to property and no means except the property itself, would be assisted in this manner. But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable, so as to be inequitable against the party or to be made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to them. [p. 230, col. 2.]

A agreed to supply money to *B* for recovery of 354 *kanals* of land to which he had a just title, but which he could not recover for want of funds, in consideration of half the land going to *A*, as soon as *B's* suit was decreed and the remaining half on *B's* death. *A* became responsible for the expenses of litigation and for the costs of the opposite party if *B's* suit failed. The actual expenses, however, of the litigation could not exceed Rs. 1,000 and did not in fact exceed Rs. 600, as *B* got a decree by compromise:

Held, that the reward (practically the whole of land recovered by *B*) which *A* was to get in return for about Rs. 600 was so much out of all proportion that the bargain was unconscionable and, therefore, illegal as against public policy. [p. 231, col. 1.]

Second appeal from a decree of the Additional Judge, Lahore, dated the 11th June 1923.

Lala *Badri Das*, R. B., for the Appellant.

Bakhshi *Tek Chand* and Diwan *Mehar Chand*, for the Respondent.

JUDGMENT.—The facts of the case out of which this second appeal has arisen are simple enough. There were two persons Nihal Das and Kishen Das who were in possession of certain lands in the villages of Ram Thamma, Malian and Kiampur in the Chunian Tahsil of the Lahore District in which Sant Ram, defendant No. 2, who died during the pendency of the suit, claimed a half share. Sant Ram wanted to institute a suit for the recovery of his share in those lands but had no funds of his own to prosecute the suit. On the 9th of February 1910 he entered into an agreement with the present plaintiff Kesho Das by which in consideration of the latter agree-

ing to supply him with money for the expenses of the litigation he undertook to give him a certain share in the lands. The main features of the agreement were that Kesho Das was to be responsible for all the expenses of the litigation, that he was also to be responsible for the costs of the opposite party if the suit failed and that if the suit succeeded, he was to become owner of one-half of the land situated in the village Ram Thamma at once and of the other half in that village and of land in the other villages after the death of Sant Ram. It was further agreed that Sant Ram was not to compromise the case without the consent of Kesho Das. In July 1910 Sant Ram accordingly instituted a suit for possession of 350 *kanals* 6 *marlas* of land situated in the three villages above named. This suit was eventually compromised on his taking a total area of 258 *kanals* 10 *marlas* in the village Ram Thamma and on his giving up his claim in the other two villages. In June 1912 shortly after the compromise Sant Ram mortgaged one-half of this holding to one Arjan Das for a sum of Rs. 1,000. Kesho Das thereupon brought two suits, one for possession of 129 *kanals* 5 *marlas* to which he was immediately entitled under the agreement of February 1910 and the other for a declaration that the mortgage made in favour of Arjan Das was invalid and that it would be ineffectual after the death of Sant Ram so far as his (the plaintiff's) rights under the agreement were concerned. Both these suits were also compromised, the plaintiff having accepted immediate possession of 112 *kanals* out of the Ram Thamma land in lieu of 129 *kanals* possession of which had been sued for by him and his having agreed to become liable for the charge of Rs. 1,000 created in favour of the mortgagee Arjan Das in respect of the other area of 129 *kanals* which was to come to him (Kesho Das) after the death of Sant Ram. In March 1920 Sant Ram executed a deed of gift in favour of Tulsi Das, the present respondent, in respect of this other area of 129 *kanals* stating therein that Tulsi Das was his *chela*, that he had been serving him as such for the last six or seven years and that the donor cancelled the agreement of February 1910 so far as Kesho Das's rights to succeed to him after his (Sant Ram's) death were concerned. The plaintiff Kesho Das thereupon brought the present suit in March 1921 for a declaration that the gift was invalid and that it would have no effect on his rights under the agreement after the death of the donor. Sant Ram died during the pendency of the suit and the plaintiff Kesho Das then made an application that Jagan Nath, his (Kesho Das's) son, be brought on the record as the legal representative of Sant Ram on the ground that the deceased had appointed him his *chela* some ten or twelve years before the institution of the suit. This application was rejected by the Trial Court after enquiry, it having been found that Jagan Nath was not the *chela* of the deceased. On the merits both the Courts below dismissed the suit holding that the plaintiff had already been sufficiently recompensed by the award of 112 *kanals* of Ram Thamma land and that he was consequently not entitled to any further relief. Against this decision the plaintiff has now preferred a second appeal to this Court and I have listened to lengthy arguments by Counsel on both sides. The law applicable to this case is very clearly laid down in the case of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) where their Lordships of the Privy Council observe as follows :—

"A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, would be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

The latter part of this passage is clearly applicable to the present case and the sole question for determination is whether the agreement was or was not so unfair and unconscionable in its inception as to be

(1) 4 I. A. 23; 2 C. 233; 1 Ind. Dec. (N. S.) 442 (P. C.).

inequitable against the opposite party. It is argued that *prima facie* there was nothing unfair about the agreement and that the subsequent conduct of Sant Ram shows that he, at any rate, never thought that it was so. It is pointed out that the plaintiff Kesho Das undertook not only to assist the deceased Sant Ram with money for the expenses of his litigation but also became responsible for the costs of the opposite party if the former was unsuccessful in his suit. It is further pointed out that the present defendant Tulsi Das was not in existence at the time the contract was entered into and that he is, therefore, not entitled to raise any objection as to the inequitable nature of the transaction. Next, very urgent stress is laid upon the fact that the agreement was re-affirmed by the deceased in 1912 when a suit for the cancellation of the mortgage effected by him was compromised and an undertaking given by the present plaintiff that he would also become responsible for the re-payment of the money to the mortgagee. It is urged that all these circumstances indicate that the plaintiff was quite fair in his dealings and that there was an honest desire on his part to help the deceased. This may very probably be correct, but this is not the real point in the case. The plaintiff may have been quite fair in his dealings and the contract may not, therefore, be void as contrary to public policy. The question, however, is whether the reward which the plaintiff was to get under the contract was or was not so much out of all proportion as to be considered unconscionable and to disentitle him from claiming any further relief. It is admitted that the suit, which the deceased Sant Ram instituted, related to about 354 *kanals* of land in three different villages. The agreement with the plaintiff was that he would be entitled to get half of the land as soon as the suit was decreed and the rest after the death of the then plaintiff Sant Ram. The expenses of the litigation, even if the case had gone up to the Chief Court, could not have exceeded Rs. 1,000. In return the plaintiff was to get practically the whole of the land which was then in suit though, of course, possession of one-half was to be postponed till after the death of the then plaintiff. It appears to me that the plaintiff must have represented to the deceased the likelihood and the necessity of an extensive litigation a representation which was wholly unwarranted by the facts. As a matter of fact the proceedings in the suit were brief and simple and could in no circumstances have cost the plaintiff more than Rs. 500 or Rs. 600. The Court-fee required for the plaintiff was not much and the suit having been compromised, the fees paid to Counsel could not have been very heavy. In such circumstances there can possibly be no doubt as to the unconscionable nature of the bargain and I concur with the learned Judge of the Court below that the plaintiff is not entitled to any further relief.

The result is that the appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 86 OF 1924.

February 23, 1925.

Present:—Mr. Hallifax, A. J. C.

BISAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUMER SINGH—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 13, 105—Tenant of holding in separate patti *included in* mahal, *whether tenant of* malguzar *of* patti *or* mahal—*Transfer of occupancy holding—Remedy of landlord—Civil suit, maintainability of.*

A person whose holding is situated in a separate *patti* consisting of *khudkasht* is a tenant of the *malguzar* of that *patti* and not of those of the whole *mahal* of which the *patti* forms a part. [p. 232, col. 1.]

Where an occupancy holding is transferred in contravention of the provisions of the C. P. Tenancy Act, the sole remedy of the landlord is to recover possession of the holding by an application to a Revenue Officer under s. 13 of the Act, and a civil suit for the purpose is barred under s. 105 of the Act. [p. 232, col. 2.]

Appeal against a decree of the Additional District Judge, Raipur, dated the 12th November 1923, in Civil Appeal No. 135 of 1923.

Mr. *K. V. Deoskar*, for the Appellants.

Mr. *K. K. Gandhe*, for the Respondent.

JUDGMENT.—One Deonath Gadaria had a four-anna share in the village of Singarbhata which included, to use the ordinary phrase, 9·82 acres of *khudkasht* land held by him separately. This land

formed a separate *patti* in the village according to the definition in cl. (12) of s. 2 of the Land Revenue Act, and it is more correct to say that Deonath's property was a separate *patti* consisting of the *khudkasht* and an undivided four-anna share in the *shamilat patti* consisting of the rest of the *mahal* except such other *pattis* of *sir* or *khudkasht* as may have been similarly partitioned off.

On the 13th of February 1920, Deonath sold half his undivided share and the whole of his *patti* to the plaintiffs, Bisahu Kurmi and others, stipulating in the sale-deed that he was to remain in possession of the *khudkasht* as an occupancy tenant. His position after this sale is clear enough, but it will perhaps be still clearer if the fact that he sold an undivided share in the village along with his *patti* is left out of consideration. Whether, in selling the *patti*, he is to be regarded as having excluded the tenancy right from what he transferred or as having transferred all rights and having had the tenancy right subsequently granted to him by the plaintiffs does not matter. He was, thenceforward an occupancy tenant of land belonging solely to the plaintiffs, and situated in their separate *patti*.

On the 30th of April 1921 Deonath sold his occupancy right to the defendant Sumer Singh Chamar for Rs. 180, paying Rs. 18 for allowing the transfer to Shriram Shukul, who is *lambardar* of the *mahal* which includes the *patti* consisting of the 9·82 acres of *khudkasht*, but not of that *patti*. This matter is explained in *Ramkrishna Puri* v. *Tanba* (1). On the 5th of September 1922, the plaintiffs sued for possession of the land on the ground that tenancy in their land could not be created by Shriram Shukul, who was not the owner of it, and Sumer Singh was a trespasser.

In the First Court it was held that the principles explained in *Dhondba* v. *Vishwanath* (2) as applicable to *sir* land held separately applied also to *khudkasht*, and the plaintiffs were given a decree for possession. In appeal the learned Additional Judge was of opinion that the principles stated in *Dhondba* v. *Vishwanath* (2) did not apply to *khudkasht*, and Deonath was the tenant of the whole proprietary body of the village and not of the plaintiffs alone; the suit was accordingly dismissed. The reasoning of the First Court is correct as far as it goes, but it does not go far enough and its decree is wrong. The dismissal of the suit by the lower Appellate Court is correct but the reasons given for it are not.

Deonath, as has been shown, was the tenant of land in the plaintiffs' *patti* and was their own tenant, not the tenant of the co-owners of the *shamilat patti*. But the sale of the occupancy rights by Deonath to Sumer Singh was, undoubtedly, a transfer of his holding by an occupancy tenant. The plaintiffs could get it set aside and could recover possession by application to a Revenue Officer under s. 13 of the Tenancy Act, and under s. 105 of that Act they cannot, therefore, be given these remedies by a Civil Court. Their application to a Revenue Officer would seem, however, to be barred by time, even if they get any benefit out of s 14 of the Limitation Act.

Possibly the plaintiffs could be given a declaration in this suit, even if the defendant objected, that they are the only landlords of the *patti* and that he must pay the whole of his rent to them. He agrees, however, that they shall be given such a declaration, provided that he is not held responsible to them for any *nazarana* or any rent he has already paid to Shriram Shukul, which they must recover from Shriram if they can. The plaintiffs have agreed to this, and a decree will issue accordingly in supersession of that of the lower Appellate Court. Each party will pay its own costs in all three Courts.

G. R. D. *Order accordingly.*
Z. K.

(1) 71 Ind. Cas. 777; 19 N. L. R. 59; 6 N. L. J. 85; (1923) A. I. R. (N.) 153.
(2) 15 C. P. L. R. 143.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 897 OF 1922.
May 22, 1925.
Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.
Lala BAMBHADUR LAL AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat GUNGORA KUAR—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 22 (2)—Occupancy holding—Co-sharer landlord purchasing

holding, status of—Purchaser ceasing to be co-sharer, effect of.

The status of a co-sharer landlord purchasing an occupancy holding is not the status of a *raiyat* but a peculiar status created by s. 22 (2) of the Bengal Tenancy Act. His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the land. It is not the status of a *raiyat* inasmuch as if he sub-lets to a third person such third person is deemed to be a *raiyat* in respect of the land and not an under-*raiyat*. The status is a peculiar status which attaches to the co-sharer so long as he remains a co-sharer. If he ceases to be a co-sharer and his proprietary interest is lost he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. [p. 234, col. 1.]

(Case-law referred to.)

Appeal from a decision of the Subordinate Judge, Saran, dated the 7th August 1922, reversing that of the Munsif, Chapra, dated the 10th December 1921.

Mr. *Murari Prasad*, for the Appellants.

Mr. *Har Narayan*, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendants and it arises out of a suit brought by the plaintiff-respondent for a declaration of her title and for recovery of possession. The suit was dismissed by the Munsif, but on appeal the decree of the Munsif has been set aside and the suit has been decreed by the Additional Subordinate Judge.

The facts as admitted or found are shortly these:—"The plaintiff was the proprietor of 8-annas of *Mouza* Chandwa bearing *Touzi* No. 435, and Hanuman Sahay and Lal Narayan were the proprietors of the remaining 8-annas share. Hanuman Sahay and Lal Narayan instituted a suit for rent against two *raiyats* Aklu and Juman who had a holding of 1 *bigha*, 7 *kathas*, 10 *dhurs* within this *touzi*. They obtained a decree and sold the holding in execution and purchased it themselves in 1909. Delivery of possession was given to them on the 21st of June 1909. The defendant No. 1 who is one of the appellants in this case, the other appellants being his co-sharers obtained a settlement of the holding from Hanuman Sahay and Lal Narayan. The plaintiff brought a suit of her share of the rent in the year 1911. This suit was against the original tenants Aklu and Juman, and Hanuman Sahay and Lal Narayan were also made parties to the suit. A decree was obtained by the plaintiff, and in execution thereof the holding was again sold and purchased by the plaintiff in November 1913, and she alleges to have taken delivery of possession on the 17th of May 1914. The Record of Rights of the village in dispute was finally published in 1918 and in the *khatian* the defendants were entered as being in possession of the land in dispute but as trespassers. The plaintiff brought the present suit for a declaration of her title as purchaser and for a declaration that the defendants had no right or interest in the land in dispute and that the entry in the Record of Rights as regards the possession of the defendants was wrong. It appears that subsequently the plaintiff's proprietary interest was sold and purchased by one Bikramjit Misser. In the plaint as originally framed the plaintiff wanted a declaration of her title as proprietor, but at the hearing she tried to amend the plaint by claiming a *raiyati* interest in respect of the land in dispute, her proprietary interest, as already said, having been sold and purchased by Bikramjit Misser.

The learned Munsif found that the status of the plaintiff in respect of the land in dispute was that of a *bakasht* holder and that she was not the *raiyat* of the land and that as her proprietary interest had been sold she had no interest subsisting in the land in dispute. He accordingly dismisseb the suit.

On appeal by the plaintiff the learned Subordinate Judge has set aside the decree of the Munsif and has held that the status of the plaintiff was that of a *raiyat* and that the sale of her proprietary interest did not affect her *raiyati* interest. He accordingly made a declaration in favour of the plaintiff as regards her title to the land as a *raiyat* and directed that she be put in possession thereof.

The defendants have come up in second appeal to this Court.

The principal point for consideration in the present case is as to what was the status of the plaintiff in respect of the land in dispute. This depends on a construction of s. 22 (2) of the Bengal Tenancy Act. The learned Subordinate Judge has relied upon the decisions of this Court in *Ram Prasad* v. *Gopal Chand* (1), *Nandkishore Singh* v. *Mathura Sahu* (2) and *Emamuddin* v. *Mohammad Rashidul Huq* (3). On the other hand reliance has been

(1) 58 Ind. Cas. 955; 2 P. L. T. 163.
(2) 65 Ind. Cas. 586; 3 P. L. T. 13; (1922) A. I. R. (Pat.) 193.
(3) 53 Ind. Cas. 110; 4 P. L. J. 540.

placed on behalf of the appellants upon the cases of the *Midnapur Zemindary Co., Ltd.* v. *Naresh Narayan Roy* (4), *Roshan Ali* v. *Chandra Mohan Das* (5), *Stonewigg* v. *Dwarka Singh* (6), *Basudeo Narayan* v. *Radha Kishun* (7) and *Raja Ram Sahu* v. *Jhanti Gope* (8). In my opinion the status of a co-sharer landlord purchasing an occupancy holding is not the status of a *raiyat* but a peculiar status created by s. 22 (2). His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors their shares of the rent. It is not the status of a *raiyat* inasmuch as if he sub-lets to a third person such third person is deemed to be a *raiyat* in respect of the land and ordinarily a *raiyat* sub-letting to a third person does not confer a *raiyati* but an under-*raiyati* interest. Therefore the status created is a peculiar status which attaches to the co-sharer so long as he remains a co-sharer. In my opinion if he ceases to be a co-sharer and his proprietary interest is lost he has no right to retain possession of the land and it would pass on to the person who would acquire the interest of that co-sharer. In *Ram Prasad* v. *Gopal Chand* (1), there was a partition amongst the co sharers and by that partition the land purchased by one co-sharer was allotted to another co-sharer and it was held that the co-sharer who had purchased the holding was entitled to retain possession of the land under the provisions of s. 22 (2) of the Bengal Tenancy Act, inasmuch as the section provides that he was entitled to hold that land on payment of rent to the other co-sharers. The facts of the case in *Nandkishore Singh* v. *Mathura Sahu* (2) were also similar. In these cases the interest of the co-sharer who had purchased the holding did not cease; he continued to be the proprietor after the partition, and hence it was held that he was entitled to retain possession. In the present case the plaintiff has ceased to be the proprietor of the village and she claims a *raiyati* interest in the land. In my opinion she has no right to remain in possession of the land as a *raiyat* when her proprietary interest has ceased. She can only continue to retain possession of the land under s. 22 (2) of the Bengal Tenancy Act so long as she remains a proprietor, and whatever right she acquired continued only so long as her proprietary interest continued. The other cases cited at the Bar have no direct application to the facts of the present case. I am, therefore, of opinion that the proprietary interest of the plaintiff having admittedly ceased to exist she has no title left in the land in dispute and she is not entitled to a decree declaring her title or awarding possession to her. In my opinion the decision of the Munsif was correct. The decree of the Subordinate Judge will be set aside and that of the Munsif restored with costs throughout.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

(4) 80 Ind. Cas. 827; 29 C. W. N. 34; (1924) A. I. R. (P. C.) 144; 26 Bom. L. R. 651; 47 M. L. J. 23; 51 C. 631; 35 M. L. T. 169; (1924) M. W. N. 723; 20 L. W. 770; 51 I.A. 293; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193 (P. C).

(5) 75 Ind. Cas. 447; 50 C. 749; 27 C. W. N. 759; (1923) A. I. R. (C.) 701.

(6) 45 Ind. Cas. 706; 4 P. L. W. 428.

(7) 65 Ind. Cas. 281; 3 P. L. T. 22; (1922) A. I. R. Pat.) 62; (1922) Pat. 55.

(8) 34 Ind. Cas. 75.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1445 OF 1921.

February 26, 1225.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

DHIAN SINGH AND OTHERS—PLAINTIFFS —APPELLANTS

versus

GURDIT SINGH—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 114, ill. (i)—Suit on negotiable instrument—Loss alleged by plaintiff—Payment, plea of—Burden of proof.

Where in answer to a suit to recover money on the basis of *hundis* which are alleged by the plaintiff to have been lost, the defendant admits execution but pleads discharge and a return of the *hundis* by the plaintiff and their subsequent destruction by himself, the burden lies on the defendant to prove payment. In such a case no presumption of discharge under s. 114, ill. (*i*) of the Evidence Act arises. [p. 235, col. 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 8th April 1921, reversing that of the Senior Subordinate Judge, Rawalpindi, dated the 7th January 1921.

Lala *Fakir Chand*, for the Appellants.

Sardar *Khazan Singh*, for the Respondent.

JUDGMENT.—In this suit the plaintiff-appellant Dharam Singh sued for

Rs. 2,634-5-6, Gurdit Singh as principal and Sant Singh and Makhan Singh as sureties on two *hundis* for Rs. 1,000 each, dated the 28th of January 1916. Plaintiff alleged that his house had been broken into in the year 1917 and these *hundis* along with other property had been stolen. Gurdit Singh, on the other hand, pleaded that the *hundis* were paid off and returned to him, and that he had torn them up. Defendants Nos. 2 and 3 plead ignorance and state that they were not sureties.

The First Court passed a decree for the full sum claimed against Gurdit Singh with costs, but dismissed the suit against defendants Nos. 2 and 3.

Gurdit Singh appealed, and the learned District Judge held that as plaintiff alleged that the *hundis* had been stolen from him he was bound to prove the loss, and that as he had failed to do this or to produce the *hundis* he must presume that they had been paid. He relied in support of this upon the Privy Council case of *Kundan Lal* v. *Begam-un-nisa* (1). At the time when Dharam Singh's house is said to have been broken into by burglars there was a Police enquiry, and the learned District Judge has attached great importance to Gurdit Singh's statement before the Inspector of Police on the 16th December 1917. This statement was that the *hundis* had been stolen, and the District Judge says that the plaintiff must have known all this and in spite of it he did not sue until February 1919. His final conclusion is as follows:—

"Taking into account the fact that the plaintiff has failed to prove the loss of the *hundis* and that the presumption, therefore, is that they were paid off, together with the evidence on the file, I have no hesitation in holding that it has been sufficiently proved that they have been discharged."

The Trial Court criticised the evidence produced by Gurdit Singh in regard to the payment of the sum of Rs. 1,400. It regarded it as unsatisfactory and disbelieved it. The learned District Judge does not say that he does believe this evidence. In fact he remarks that it may not be satisfactory.

The plaintiff has preferred a second appeal to this Court against Gurdit Singh alone, and it is contended on his behalf that the Privy Council case relied upon by the learned District Judge is distinguishable. In that case it was held that when in a suit on a bond the plea of discharge is set up and the document creating the obligation is produced by the defendant the onus of rebutting the presumption of discharge lies in the first instance on the plaintiff. In the present case, however, the documents, *i. e.*, the *hundis* creating the obligations, are not produced by the defendant Gurdit Singh and, therefore, the presumption of discharge does not arise under s. 114, illustration (*i*) of the Indian Evidence Act, and the Privy Council ruling is clearly distinguishable. Counsel for the appellant cites *Chuni Kuar* v. *Udai Ram* (2), where the plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. It was held that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both. This was followed in the case of *Jagan Nath* v. *Kamta Singh* (3) in which the plaintiff sued for money due upon a bond, but alleged its loss, whilst the defendant admitted execution, but pleaded payment. It was held that the onus lay on the defendant to prove payment. Similarly in the present case we consider that the onus lay upon Gurdit Singh to prove payment. It is quite clear from the judgment that the learned District Judge was very strongly influenced in his conclusion by his erroneous view that the presumption in this case was that the *hundis* had been paid off, which conclusion is quite vitiated by the view that he took on this point. He should decide whether on the evidence it is proved that the *hundis* had been paid off or not.

We, therefore, accept the appeal and setting aside the decree of the lower Appellate Court, so far as it concerns Gurdit Singh, remand the case to it for re-decision under O. XLI, r. 23, C. P. C. Stamp in this Court will be refunded. Other costs will be costs in the cause.

Z. K. *Appeal accepted; Case remanded.*

(1) 47 Ind. Cas. 337; 22 C. W. N. 937; 8 L. W. 233 (P. C.).

(2) 6 A. 73; A. W. N. (1883) 221; 3 Ind. Dec. (N. S.) 648.

(3) 32 Ind. Cas. 349; 2 O. L. J. 498.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 62 OF 1924.

April 7, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

SHANKARLAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GANESH SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 52—Legal representatives suit against—Assets not proved—Dismissal of suit, legality of.

A suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased.

Madho Ram v. *Delbur Mahul*, 2 N. W. P. H. C. R. 449 and *Lallu Bhagvan* v. *Tribhuvan Motiram*, 13 B. 653; 7 Ind. Dec. (N. S.) 432, referred to.

Appeal against a decree of the District Judge, Saugor, dated the 24th November 1923, in Civil Appeal No. 92 of 1923.

Mr. *G. L. Subhedar*, for the Appellants.

Mr. *J. Sen*, for the Respondents.

JUDGMENT.—This was a suit for recovery of money due on a promissory note for Rs. 500 executed by *Musammat* Tulsa in favour of the plaintiffs Tulsa died before the institution of the suit and defendants who are her husband's first cousins were impleaded as defendants on the ground that they were her heirs and in possession of the assets left by her.

The First Court found that the debt covered by the promissory note was not incurred for legal necessity and dismissed plaintiff's claim on the ground that it had not been proved that the defendants had inherited any property belonging to Tulsa. The lower Appellate Court accepted the finding of the First Court in regard to the absence of legal necessity but held that the defendants were in possession of some property belonging to Tulsa as her heirs and accordingly passed a decree against the defendants to the extent of Tulsa's assets in their hands. Against this decree defendants have preferred this appeal which, in my opinion, must fail.

Defendants have admitted that they are the heirs of *Musammat* Tulsa. They have also admitted that certain absolute occupancy land which was owned by Tulsa's father Ramlal was on Ramlal's death released by his widow *Musammat* Rajrani in favour of Tulsa and her husband Sunderlal. The release could really speaking be in favour of Tulsa alone, who was Ramlal's heir. But for some reasons, the name of Tulsa's husband was also added in the deed of release. It is alleged that the consideration for the release was paid out of the funds of the joint family consisting of Tulsa's husband and the defendants. That may be so but the fact that the release was obtained in the name of Tulsa and Sunderlal, goes to show that it was contemplated from the very outset that Tulsa should have some interest in the property covered by the release. It is not necessary to decide what her share was in the property released. But it would appear that she had some share and that share has passed to the defendants and is in their possession. Moreover from the evidence adduced by defendants themselves, it would appear that Tulsa had her own separate dealings and whatever assets she may have left have presumably passed into the hands of the defendants, who are her sole surviving heirs. The lower Appellate Court was in these circumstances perfectly justified in passing a decree against the defendants to the extent of the assets of the deceased Tulsa in their hands.

Moreover, it has been repeatedly held that a suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased: *Madho Ram* v. *Delbur Mahal* (1) and *Lallu Bhagvan* v. *Tribhuvan Motiram* (2).

The decree appealed against is correct and I dismiss this appeal with costs. Costs in the Court below will be paid as ordered by the lower Appellate Court.

Z. K. *Appeal dismissed.*

(1) 2 N. W. P. H. C. R. 449.
(2) 13 B. 653; 7 Ind. Dec. (N. S.) 432.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 50 OF 1924.

July 7, 1924.

Present:—Justice Sir Jwala Prasad, KT., Acting Chief Justice, and Mr. Justice Macpherson.

RAI KASHINATH SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

KAILAS SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4

—*Rent-suit—Liability of defendant, nature of—Death of defendant—Legal representatives, substitution of, absence of—Abatement, extent of.*

In order to determine whether the death of one of several judgment-debtors during the pendency of a suit operates to cause the abatement of the entire suit or only with regard to the interest of the deceased defendant, the test to be applied is whether the liability of the defendants was joint or joint and several. If the liability of the defendants is joint and several, the plaintiff is entitled to continue his suit against the remaining defendants and the effect of his omission to bring the legal representatives of the deceased defendant upon the record would only be the abatement of the suit against that defendant, and not the abatement of it against all the defendants. [p. 237, col. 2.]

A claim for rent is joint and several as against the tenants and the death of one of the tenants, therefore, during the pendency of a suit for rent, does not cause the abatement of the suit against all the tenants. The suit abates only against the deceased defendant. [p. 238, col. 1.]

Appeal from an order of the Additional Subordinate Judge, Gaya, dated the 18th December 1923, reversing that of the Munsif, Gaya, dated the 19th June 1923.

Mr. *J. P. Sinha*, for the Appellant.

JUDGMENT.

Jwala Prasad, Ag. C. J.—This is an appeal against an order passed by the Subordinate Judge of Gaya, dated the 18th December 1923, setting aside an order of the Munsif of Gaya, dated the 19th June 1923.

The order in question relates to the execution of a decree obtained by the appellant against a number of persons as defendants. The decree is dated the 17th February 1922 and is said to be a rent-decree. An objection was raised by some of the judgment-debtors to the execution of the decree upon the ground that three of the judgment-debtors were dead at the time when the decree was passed and consequently the decree was a nullity and incapable of execution. This objection was overruled by the Munsif who held that there was no good evidence to show that three of the judgment-debtors were dead before the decree was passed.

On appeal the Subordinate Judge held that there was good evidence as to one of the judgment-debtors Chhedi having died before the decree was passed.

This is a finding of fact and is not capable of challenge in second appeal. The learned Subordinate Judge, however holds that as one of the judgment-debtors, Chhedi, had died before the decree was passed the entire decree is a nullity and incapable of execution. Upon this view he allowed the appeal and dismissed the execution case.

As a point of law the learned Subordinate Judge is not correct in stating that the death of one of the defendants necessarily makes the entire decree null and void. The suit apparently was instituted against a number of defendants with respect to arrears of rent due from them. The decree or a copy thereof is not on the record but the description thereof in the application for execution shows that it was a rent-decree and the Munsif also incidentally refers to it as a rent-decree. If it was a rent-decree the liability of the defendants was joint and several and the plaintiff was entitled to enforce his claim for rent against the defendants jointly and severally. Therefore upon the death of one of the defendants he was entitled to continue his suit against the remaining defendants and the effect of the omission to bring the legal representatives of the deceased defendant upon the record would only be the abatement of the suit against that defendant and not necessarily the abatement of it against all the defendants. Such is the law as laid down in r. 4 of O. XXII of the C.P.C. which runs thus:—

"4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendant alone, or a sole defendant or sole surviving defendants dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

Clause (3) of that rule says :—

"Where within the time limited by law no application is made under sub-r. (1), the suit shall abate as against the deceased defendant."

Therefore if the right to sue against the remaining defendants survives the death of one of the defendants will not cause the abatement of the entire suit but only as against the deceased defendant. The present Code of 1908 has set at rest the doubt that possibly arose under the old law. As a matter of fact under the old law although the wording was not clear the interpretation given to it by the several High Courts shows that the suit would not necessarily abate on account of the death of one of several defendants if the right to sue survives against the remaining defendants. The authorities have been referred to in Mulla's Code of Civil Proce-

dure under O. XXII, r. 4 and I need only refer to two cases. *Abdul Aziz* v. *Basdeo Singh* (1) and *Joy Gobind Laha* v. *Manmotha Nath Banerji* (2), I quote these authorities not only for the purpose of showing that the suit will not abate by reason of the death of one of the defendants provided the right to sue survives against the remaining defendants but also for the proposition that a claim for rent is joint and serveral as against the tenants. The placitum in the Allahabad case which agrees with the body of the ruling runs as follows :—

"Held that the liability of joint holders of a fixed rate tenancy to payment of rent is joint and several and not joint only. The failure, therefore of the plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representative of a deceased defendant is no bar to the continuance of the suit against the remaining defendants." The learned Judges observe that the case seems to be covered by the decision of the Calcutta High Court in *Joy Gobind Laha* v. *Manmotha Nath Banerji* (2). That was a suit against several persons for the recovery of the rent of a holding. Their Lordships also observed that they found no reason for distinguishing between the liability of several holders of a fixed rate tenancy and the liability of several tenants of any other holding. Therefore if the decree was with respect to rent the liability of the "judgment-debtors was joint irrespective of the nature of the holding. Consequently the death of" judgment-debtor, Chhedi, does not at all affect the liability of the other defendants and the suit did not abate against these defendants and the decree against those defendants remains valid. As observed above, I have referred to the authorities of the Calcutta and Allahabad High Courts because they related to claims for rent but the cases referred to by Mr. Mulla which I have carefully gone through show that the principle applies to all kinds of claims where the claim can be enforced jointly and severally against the defendants. The test, therefore, is whether the liability of the defendants or the judgment-debtors is joint and several in order to determine whether the death of one of the defendants or judgment-debtors renders the entire decree null and void. It would have been well if we had a copy of the decree upon the record but in the absence of the decree I rely on the description thereof given in the execution petition and the judgment of the Munsif. I, therefore, set aside the order of the Subordinate Judge and restore that of the Munsif and direct the execution to proceed except as against the deceased judgment-debtor Chhedi Singh and his legal representatives. The decree so far as Chhedi and his legal representatives are concerned is null and void. The appeal is decreed with costs. There is no appearance on behalf of the opposite party.

Macpherson, J.—I agree.

Z. K. *Appeal decreed.*

(1) 17 Ind. Cas. 99; 34 A. 604; 10 A. L. J. 183.
(2) 33 C. 580.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 1143 OF 1920.
May 9, 1924.
Present:—Mr. Rupchand Bilaram, A. J. C.

TULSIDAS KESHOWDAS—PLAINTIFF
versus
Khan Sahib RAMZAN ABDULLA AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Mortgage suit—Death of one defendant after preliminary decree—Substitution, absence of—Legal representatives, all, whether must be impleaded—Abatement, extent of.

An application for the substitution of the legal representatives of a party who dies after the passing of a preliminary decree but before a final decree is passed in a mortgage suit is governed by the provisions contained in O. XXII of the C. P. C., as the suit continues to be pending until the passing of the final decree. [p. 239, col. 1.]

Muhammad Masih Ullah Khan v. *Jarao Bai*, 27 Ind. Cas. 771; 37 A. 226; 13 A. L. J. 307 and *Nizam-ud-din Shah* v. *Bohra Bhim Sen*, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85, relied upon.

All the legal representatives of a deceased defendant must be brought on the record within the time allowed by law, otherwise the suit would abate in respect of the interest of such defendant. [p. 239, col. 2.]

Sidik Muhammad Shah v. *Saran*, 76 Ind. Cas. 314; (1925) A. I. R. (S.) 2, followed.

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, 26 M. 230; 12 M. L. J. 368 and *Jehrabi Sadulla Khan Mokasi* v. *Bismillabi Sadruddin Kaji*, 80 Ind. Cas. 758; 26 Bom. L. R. 375; (1924) A. I. R. (B.) 420, not followed.

A mortgage suit does not wholly abate owing to its abatement as against one of the mortgagors. [p. 240, col. 1.]

Application for joinder of legal representatives of the deceased defendants.

Mr. *Thakursing Lalsing*, for the Plaintiff.

Mr. *Hassomal M. Gurbuxani*, for the Defendants.

ORDER.—The plaintiff instituted this suit against a Muhammadan father and his son, defendants Nos. 1 and 2, for recovery of Rs. 1,740 advanced by him to both of them on the equitable mortgage of their property. On the 1st March 1921 a preliminary decree was passed in his favour. On 14th August 1922 defendant No. 1 died, leaving behind him as his heirs his son, defendant No. 2, and two daughters who are not on the record. On the 10th January 1924 the plaintiff applied for a final decree being passed in his favour and $2\frac{1}{2}$ months later applied for joining defendant No. 2 and the two daughters of defendant No. 1 as his legal representatives, it is urged on behalf of defendant No. 2 that this application for joinder is not application in execution proceedings but an application in a pending suit governed by the provisions of O. XXII, C. P. C. and as such it is out of time. I am of opinion that this objection should prevail. The explanation to the definition of a "decree" in s. 2, C. P. C., provides that a decree is a preliminary decree when further proceedings have to be taken before the suit can be completely disposed of and that is final when such adjudication completely disposes of the suit. A preliminary mortgage decree does not completely dispose of the suit. The plaintiff cannot recover the amount awarded to him under the preliminary decree in execution proceedings till he has moved the Court and got a final decree passed in his favour. Till such final decree is passed the suit continues to be pending. The same view has been taken by the Allahabad High Court in *Muhammad Masih Ullah Khan* v. *Jarao Bai* (1) and *Nizam-ud-din Shah* v. *Bohra Bhim Sen* (2). The present application for joinder of legal representatives is, therefore, an application in a pending suit, and is clearly out of time. There are no grounds for condoning the delay by the plaintiff in not moving the Court earlier. He was aware of the death of defendant No. 1 about the time it took place and at any rate he knew of it not later than August 1923 when he instituted another suit in this Court, being Suit No. 623 of 1923 against the legal representatives of defendant No. 1 in respect of another mortgage claim. It is urged that it is not necessary to place on record all the legal representatives of a deceased defendant and that any one of his legal representatives if placed on the record sufficiently represents the deceased. It is further contended that as defendant No. 2 who is one of the heirs is already on the record he represents the estate of the deceased defendant and that the suit has not, therefore, abated, and reliance has been placed on the ruling in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (3) and *Jehrabi Sadulla Khan Mokasi* v. *Bismillabi Sadruddin Kaji* (4). A Bench of this Court has, however, held that it is necessary to bring all the legal representatives of a deceased defendant on the record. In *Sidik Muhammad Shah* v. *Saran* (5). Sitting as a Single Judge on the Original Side of this Court, I am bound by this decision. The failure to join all the legal representatives would, therefore, in the absence of any extenuating circumstances result in an abatement. It may further be noted that even defendant No. 2 is not on the record as a legal representative of defendant No. 1, but in his own personal capacity, and that even if the representation by one of the heirs of the deceased defendant be sufficient, the failure of the plaintiff to bring him on the record as a legal representative of defendant No. 1 equally works out the abatement of the suit against defendant No. 1. I hold that the suit so far as the plaintiff's claim against defendant No. 1 is concerned has abated under O. XXII, r. 4, cl. (2) of the C. P. C.

This abatement does not, however, in my opinion, affect the plaintiff's claim against defendant No. 2 who was jointly and severally liable along with his father defendant No. 1. It was open to the plaintiff to institute this suit in the first instance against defendant No. 2 alone and to bring to sale the right, title and interest of defendant No. 2 in the property in suit. In such a case the Court would not inquire whether the mortgaged property or any interest therein belonged to defendant No. 2 at the

(1) 27 Ind. Cas. 771; 37 A. 226; 13 A. L. J. 307.
(2) 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85.
(3) 26 M. 230; 12 M. L. J. 368.
(4) 80 Ind. Cas. 758; 26 Bom. L. R. 375; (1924) A. I. R. (B.) 420.
(5) 76 Ind. Cas. 314; (1925) A. I. R. (S.) 2.

date of the suit, nor will the Court non-suit the plaintiff for failure to join the co-mortgagors as a party to the suit. The failure of the plaintiff to bring the legal representatives of the defendant No. 1 on the record within the period of limitation cannot, in my opinion, prejudice his rights any further than what they would have been if he had failed to join defendant No. 1 in the first instance. Though the suit has abated against defendant No. 1, the plaintiff is entitled to ask the Court to pass a final decree against defendant No. 2 alone. This will enable him to sell not only the right, title and interest of defendant No. 2 in the property at the date of the suit, but also such rights as defendant No. 2 has acquired by way of inheritance from his father prior to the date of the sale. I accordingly order that a final decree be passed against defendant No. 2 alone, and dismiss the application of the plaintiff for joinder of legal representatives with costs.

P. B. A. *Order accordingly.*
Z. K.

LAHORE HIGH COURT.

CIVIL REVISION No. 519 OF 1923.
January 25, 1924.
Present :—Mr. Justice Moti Sagar.
GURDITTA MAL AND ANOTHER—DEFENDANTS—PETITIONERS
versus
THE FIRM BASANTA MAL-PANNA LAL—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 10—Arbitration—Award—Notice of date of filing, absence of—Decree based upon award—Revision, whether lies.

The provisions of para. 10 of Sch. II to the C. P. C. are mandatory and the parties are entitled to notice of the date of the filing of an award even if they have knowledge of the date on which the award is filed. The omission to give such a notice is a material irregularity and if a decree is passed upon the award without giving such notice, the decree is liable to be set aside in revision.

Petition for revision against an order of the Senior Subordinate Judge, Jullundur, dated the 21st April 1923.

Mr. *Jai Gopal Sethi*, for the Petitioners.

Lala *Rup Ram*, for Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—On the 18th November 1922 a certain dispute was referred to the arbitration of one Murari Lal through the intervention of the Court. The award was submitted by the arbitrator to the Court on the 30th January 1923 but the defendants were not present in the Court on that date. The Court without issuing a notice to the parties, as required by cl. 10, Sch. II of the C. P. C. at once proceeded to judgment and passed a decree in accordance with the terms of the award.

Against this decree the defendants have now come in revision to this Court and the main ground urged on their behalf is that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in passing a decree on the award in contravention of the provisions of cl. 10 of Sch. II of the C. P. C. Mr. Rup Ram on behalf of the respondents admits that a notice was not sent but contends that the applicants must have been aware of the date on which the award was filed and that under these circumstances a notice was wholly unnecessary. In my opinion this contention has no force and must be overruled. The provisions of cl. 10, Sch. II of the C. P. C. are mandatory and the parties are entitled to notice even if they have knowledge of the date on which the award is filed. In *Rangasami* v. *Muttusami* (1), it was held that the omission to give such a notice was a material irregularity. In *Chatarbuj Das* v. *Ganesh Ram* (2) which was a case exactly on all fours with the present case, it was laid down that it was a good ground for revision of a decree passed upon an award filed in Court, that no notice of the filing of the award had been given, as required by s. 515 of the C. P. C., even though the applicants in revision might have received information *ali unde* that the award had been filed. I entirely concur with this view, and setting aside the decree of the Subordinate Judge direct him to restore the suit to the file and after considering the objections which may be by the applicants pass such order as appear to be just. The plaintiffs shall pay the costs of this petition to the defendants.

Z. K. *Suit remanded.*

(1) 11 M. 144; 4 Ind. Dec. (N. S.) 100.
(2) 20 A. 474; 9 Ind. Dec. (N. S.) 664.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 852 OF 1924.

January 7, 1925.

Present:—Justice Sir Babington Newbould, Kr., and Mr. Justice B. B. Ghose.

KAPIL MANDAL AND OTHERS—PETITIONERS

versus

RABBANI SHEIKH—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 146, 147, 323, 325—Rioting—Hurt and grievous hurt—Separate sentences, whether legal.

Separate sentences for the offences of rioting and hurt are legal in a case in which the common object stated in the charge is not to cause hurt but to commit some other offence and each of the persons separately sentenced is proved to have taken an individual part in the assault.

Harbans Pandey v. *Emperor*, 18 Ind. Cas. 402; 40 C. 511; 14 Cr. L. J. 66, followed.

Sarat Chandra Ghosh v. *Emperor*, 74 Ind. Cas. 1043; 37 C. L. J. 171; (1923) A. I. R. (C.) 408; 24 Cr. L. J. 851, distinguished.

Criminal revision against an order of the Sessions Judge, Murshidabad, dated the 15th September 1924, affirming that of the Deputy Magistrate, Berhampur, dated the 24th March 1924.

Mr. *Monnier* and Babu *Kanaidhone Dutt*, for the Petitioners.

Mr. *Narendra Kumar Bose* and Babu *Pannalal Chatterjee*, for the Opposite Party.

JUDGMENT.—The eighteen petitioners before us have all been convicted of rioting and sentenced to pay a fine of Rs. 50 each. The first petitioner has also been convicted of voluntarily causing grievous hurt and sentenced to two months' rigorous imprisonment and a fine of Rs. 50. Three other petitioners have also been convicted of voluntarily causing simple hurt and sentenced to one month's rigorous imprisonment each. All the petitioners have also been bound down to keep the peace under s. 106, Cr. P. C.

This Rule has been granted on two grounds. The first relates to the order under s. 106, Cr. P. C. It is contended that though the Courts below had legal power to pass such an order they did not exercise their discretion properly having regard to the facts of the case. In our opinion the facts of the case are such that they fully justify this order.

The second ground on which this Rule was issued is that separate sentences upon four of the petitioners are illegal. In our opinion this point is clearly concluded by authority. It was held in the case of *Harbans Pandey* v. *Emperor* (1), that separate sentences for the offence of rioting and hurt are legal when it is found that each person took an individual part in the assault. It has been found in this case that the four petitioners who have been separately convicted and sentenced for causing grievous hurt or hurt individually committed acts which made them liable under ss. 325 and 323, Indian Penal Code. This decision follows earlier decisions of this Court to the same effect. On behalf of the petitioners our attention has been drawn to a decision of a Bench of this Court to which one of us was a party, *Sarat Chandra Ghosh* v. *Emperor* (2). But that case is clearly distinguishable on the ground that the offence for which separate punishment was awarded in addition to the punishment for rioting was one punishable under s. 225, Indian Penal Code, and the common object of the unlawful assembly as charged was to commit that particular offence. Here the common object stated in the charge is not to cause hurt to any person but to rescue a buffalo. It is urged that there is reference to the use of force and violence in the charge. But this reference is independent of the common object. Under s. 146, Indian Penal Code, the use of force or violence is a necessary ingredient of the offence of rioting. But we are unable to accept the contention that this fact renders the separate sentences on those who actually used force or violence illegal, and as we have stated we are bound by the authority of previous decisions of this Court on this point. The Rule is discharged. The petitioners who are in bail must now surrender to their bail and undergo the unexpired portion of their sentences.

Z. K. *Rule discharged.*

(1) 18 Ind. Cas. 402; 40 C. 511; 14 Cr. L. J. 66.

(2) 74 Ind. Cas. 1043; 37 C. L. J. 171; (1923) A. I. R. (C.) 408; 24 Cr. L. J. 851.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 575 OF 1924.

October 21, 1924.

Present:—Mr. Dalal, J. C.

HASNU KHAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Police investigation tainted—Prosecution evidence, value of.

When a Police investigation with respect to any particular accused person is tainted, a Court will have great hesitation in believing the prosecution evidence as it is very difficult to know where an Investigating Officer who has been detected in fabricating false evidence will stop in such fabrication.

Appeal against an order of the Sessions Judge, Unao, dated the 31st July 1924.

The Government Pleader, for the Crown.

JUDGMENT.—This is an appeal by Hasnu from his conviction under s. 395 for the commission of dacoity. At its face value the evidence of the approver supported by the testimony of an identification witness, Gaya Prasad, appears to be sufficient. I am not prepared to accept it because certain strictures were made by the learned Judge with reference to the conduct of Sub-Inspector, Latif Uddin, during the investigation. For this reason the confession of the appellant has not been relied upon by the learned Judge. I feel very suspicious when an investigation is not carried out in good faith. It may be that this appellant was shown to Gaya Prasad prior to the identification. When a Police investigation with respect to any particular accused person is tainted, a Court will have great hesitation in believing the prosecution evidence as it is very difficult to know where an Investigating Officer who has been detected in fabricating false evidence will stop in such fabrication.

I set aside the conviction and sentence and direct his release if he is not retained in custody for any other offence.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 6 OF 1925.

May 1, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

EMPEROR—PROSECUTOR

versus

MOFIZEL PEADA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Penal Code (Act XLV of 1860), ss. 141, 304-A—Sessions trial—Disagreement between Judge and Jury—Reference to High Court—Procedure—Rioting—Person armed with gun causing injury—Sentence—Criminal trial—Map of spot, contents of.

Where a reference is made to the High Court under s. 307 of the Cr. P. C., it is the duty of the High Court not only to consider the entire evidence but also to give due weight to the opinion of the Sessions Judge and the Jury. [p. 244, col. 1.]

A person who goes into a riot with a gun loaded with a ball cartridge is apt to cause serious injuries to some one person or persons and it is a practice which cannot be looked upon lightly by the Court of Justice when determining the sentence to be passed upon such person. [p. 245, col. 1.]

A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed thereto. [p. 244, col. 2.]

Reference made by the Second Additional Sessions Judge, 24-Pergannahs, dated the 3rd February 1925.

Mr. *Langford James* and Babu *Gopendra Krishna Banerjee*, for the Accused.

Mr. *Monnier*, for the Crown.

Babu *Debendra Narain Bhuttacharjee*, for the Complainant.

JUDGMENT.

Sanderson, C. J.—This is a Reference by the learned Second Additional Sessions Judge of the 24-Pergannahs in the case of Mofizel Peada : and the learned Judge has recommended that he should be convicted under s. 302 of the Indian Penal Code.

There were 13 persons involved in the charge, all of whom, with the exception of Fazal Zamadar, were convicted of an offence under s. 147, Indian Penal Code. Mofizel Peada was found not guilty under ss. 302 and 342 read with s. 109, but the Jury found him guilty of an offence under s. 147 and also of an offence under s. 304 (*a*).

Dhanu Peada was found not guilty of an offence under s. 302 read with s. 109 and also of an offence under s. 342 read with s. 109; but, as I have already said, he was found guilty under s. 147, Indian Penal Code.

That there was a riot on the 28th June 1924, there can be no doubt, between the party of the accused on the one hand and the party to which Momtaz Molla, the man who was killed, belonged. I do not think it necessary to deal in any detail with the allegations of enmity which existed between these two parties. There is evidence that enmity existed, at all events, between certain individuals of the one party with certain individuals of the other party. It is clear that on the 28th of June there was some incident which caused both parties to assemble—Momtaz's party near the *bari* of Dhanu Peada and the accused's party partly inside and partly outside the premises of Dhanu. There was undoubtedly abusive

language: and I think the verdict of the Jury involves the finding that there was throwing of bricks by the accused's party at Momtaz Molla and his companions.

Momtaz Molla was killed by a bullet entering his body in the neighbourhood of the heart and penetrating his lungs and coming out at the back at the tenth intercostal space about an inch in the left of the spine: he must have died very shortly after he had received that wound. There is no doubt that the bullet which killed him was fired from a gun by Mofizel Peada.

The prosecution story, in short, is that the gun was fired by Mofizel Peada, that he was standing behind the wall which adjoins the road which passes the premises of Dhanu Peada, that Momtaz was in the field on the opposite side of the road on a rather lower leval and that Mofizel took a deliberate aim at Momtaz and killed him.

The written statement made by the defendant Mofizel Peada was to the effect that it was true that he had fired the gun but that he was standing on the west of the verandah—the verandah of the house and not behind the wall adjoining the road—that he fired the shot towards the field with a view to threaten the opposite party and that it was a pure accident that the bullet struck Momtaz, that he fired the shot towards the field thinking that there was no one there and that he had no intention to kill Momtaz or any one else.

It was part of the prosecution case that Dhanu had incited Mofizel to shoot Momtaz. Some of the witnesses said that they had heard Dhanu ask Mofizel to fetch Dhanu's gun and shoot Momtaz.

It seems to me that the learned Judge made a very significant observation with regard to that part of the case when he said: "The gun and license were in his name, but if there were such a shooting and hullabaloo, who would hear him give an order in the terms that we have given here? Besides that does not agree with the First Information Report statement that the gun was taken by Mofizel from the house. The evidence now given looks like an inference drawn by angry and prejudiced men."

It seems to me that it would be difficult, having regard to the distance which separated some of the witnesses and Dhanu Peada and the noise and shouts which apparently were going on, for those witnesses to have heard what is alleged to have been said, namely, that Dhanu had asked Mofizel to fetch his gun and shoot Momtaz.

With regard to the witnesses who were called on behalf of the prosecution, the learned Judge summarised his criticisms in the following manner:—"Thus it may be said generally that none of the witnesses can really be said to be disinterested except the Doctor who is not an actual eye-witness, and there is no eye-witness who has not apparently made statements which conflict with his evidence before the Committing Magistrate or the statements recorded by the Sub-Inspector."

There are other matters to which the learned Judge referred which the Jury were entitled to take into consideration but it is not necessary for me to deal with them in detail. It is sufficient for me to say that this was a case in which the Jury might come to the conclusion that they could not accept the evidence of the prosecution witnesses as being reliable in all respects.

If I understand the learned Judge's summing up and his reference, it seems to me that he has based his conclusion that the accused deliberately shot Momtaz on certain facts and inferences which are to a certain extent independent of the evidence of the witnesses for the prosecution who are alleged to have been present at the time of the occurrence.

He pointed out that the course of the bullet was in a downward direction and that it went through the body of the man. He was of opinion that there was an important corroboration of the case which was put forward by the prosecution, because it was alleged—and apparently it was a fact—that the ground behind the wall over which the accused is alleged to have fired the gun was on a higher level than the road and that the road again was on a higher level than the field on which the deceased man was standing and the learned Judge came to the conclusion that if the gun had been fired by the accused from that position and the deceased man was standing in the position which I have stated, the course of the bullet would be downward from the front to the back.

I agree with the learned Judge that that is a matter which is material for consideration. At the same time I feel that it would be dangerous for us to rely to any large extent upon that, especially in the absence of any expert evidence as to the exact level of the ground and the angle in which the

gun would have had to be held in order to inflict such a wound upon the deceased man if he had been standing in the position which I have stated.

It is, therefore, possible, in my opinion, that the Jury may have come to the conclusion that it would not be safe to accept the case for the prosecution.

The Jury then had to consider the statement which had been made by the accused person. The learned Judge seems to have formed the opinion that that statement could not possibly be true, for, amongst other reasons, that if the shot had been fired in the direction and in the manner described by the accused, the bullet must have gone over the head of the deceased person. I am inclined to agree with the learned Judge that the statement made by the accused person as it stands cannot be accepted and the Jury may have been of the same opinion.

The Jury, however, may have come to a further opinion, *viz.*, that the case for the prosecution was not in every respect accurate, and that the statement of the accused in every respect was not accurate, but that he may have fired the gun with a view to threaten the deceased man or some of his companions, although he did not fire it from the place in which he said he did and in the direction in which he said he did.

At the same time they may have concluded that he had no intention to hit anybody. In other words, the Jury may have rejected both the prosecution story and the story told by the accused and may have come to a conclusion relying only upon those facts which they thought had been proved.

When a learned Judge makes a reference to this Court under s. 307, it is the duty of this Court not only to consider the entire evidence, but also to give due weight to the opinion of the learned Judge and the Jury and in the circumstances of this case, in my judgment, it would not be right for this Court to hold that the verdict of the Jury was perverse.

The result is that, in my opinion, this Reference ought not to be accepted.

It was open, in my opinion, to the Jury to convict Mofizel Peada under s. 304 (A) having regard to the fact that there was a charge against him under s. 302. Therefore, the verdict of Jury as regards this accused, namely, that he was guilty under s. 147 and also of one offence under s. 304 (A) ought to be accepted.

Before leaving this case, I regret to say that I find it necessary once more to refer to the way in which the map in this case was prepared.

It is many years since this Court drew attention to the way in which plans were prepared: and the matter was expressly dealt with in the case of *Emperor* v. *Abinash Chandra Bose* (1), the head-note of which runs as follows:—

"A person who makes a map in a criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto:" and this Court drew attention to the fact that the Police Regulation dealing with the preparation of maps had been amended so long ago as 1920 in consequence of a representation which had been made by this Court. The Police Regulation as amended in this respect (r. 173) is set out in the report.

I should have thought that a sufficient time has elapsed to enable those who have the conduct of criminal cases in subordinate Courts to see that the directions of this Court and of the Government of Bengal are carried out.

In this case the map which, we were informed by the learned Counsel who appeared for the Crown, was placed before the Jury, is a glaring instance of what ought not to be done. In this case there was a dispute between the prosecution and the defence as to the exact position in which the accused was standing, when he fired the gun. The prosecution said that he was standing behind the wall near the road. The accused said that he was standing on the verandah of the house at some distance away. In spite of this I find on the map, a place marked near the wall with the following note: "From this place the accused Mofizel Peada fired his gun."

This is the place alleged by the prosecution. Anything more improper it is difficult to imagine. This I find in an other part of the map. "The deceased Momtaz Molla was standing here when he was met with the gun shot." These are two things which the Sub-Inspector of Police who, we

(1) 84 Ind. Cas. 654; 52 C. 172; 28 C. W. N. 995; (1924) A. I. R. (C.) 1029; 26 Cr. L. J. 350.

were told, prepared the map, could not possibly have seen, because he was not there at the time and he must have made those insertions in the map relying upon information which he received from the witnesses.

There is one thing which it was most important for the person who made the map to note but which he did not mark on the map: that is, the place where he found the body of the deceased man. The Sub-Inspector said that he found the body lying in the field. He ought to have taken careful measurements so as to identify the exact spot. That is a thing which he saw but which he did not note on the map.

I do not think it necessary for me to say anything more upon this point, as the matter has already been dealt with so frequently by this Court. In my judgment, the map in its present state ought not to have been allowed to be placed before the Jury. If it was necessary for the map to be placed before the Jury, the proper thing to be done was to have a clean copy made with these entries omitted so that the Jury would have a map before them which would not have prejudiced their minds in any way.

We now have to consider what sentence should be passed upon the accused Mofizel Peada. He was convicted by the Jury under s. 304 (A). There is no doubt that Mofizel Peada caused the death of Momtaz Molla by doing a very rash and negligent act, which did not amount to culpable homicide. In my opinion, there was no justification for the accused person taking out the gun and firing it specially with a ball cartridge in view of the situation which existed. A person who goes into a riot with a gun loaded with a ball cartridge is apt to cause serious injuries to some one person or persons: and it is a practice which cannot be looked upon lightly by a Court of Justice. In this case, the unfortunate result was that the accused caused the death of Momtaz Molla.

The trial in this case concluded at the end of January this year and the reference was made by the learned Judge on the 3rd of February so that Mofizel Peada has been in Jail for three months already expired which, but for the reference, would have been served as part of his sentence. The result, therefore, is that we take that into consideration and pass a sentence on Mofizel Peada under s. 304 (A), of fifteen months' rigorous imprisonment to commence from to-day and we pass a similar sentence for the offence under s. 147—the two sentences to run concurrently.

Panton, J.—I agree.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 12 OF 1925.

March 17, 1925.

Present:—Mr. Daniels, J. C.

EMPEROR THROUGH KALICHARAN —COMPLAINANT

versus

BRIJ BEHARI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, stage of—Examination after further cross-examination of prosecution witnesses whether necessary—Irregularity—Prejudice.

Where in a warrant case the accused is examined after the examination, cross-examination and re-examination of the prosecution witnesses, a further examination of the accused is not necessary after the charge and after the prosecution witnesses have been re-called for further cross-examination. [p. 246, col. 2.]

Assuming that such further examination is necessary, the omission to make this further examination is a mere irregularity which does not, in the absence of prejudice to the accused, affect the legality of the trial. [*ibid.*]

In re Varisai Rowther, 73 Ind. Cas. 163; 46 M. 449, 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 385; (1923) M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J. 547, *Emperor* v. *Sheopal*, 85 Ind. Cas. 943; 1 O. W. N. 833; 10 O. & A. L. R. 1381; 26 Cr. L. J. 655, and *Bechu Chaube* v. *Emperor*, 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; (1923) A. I. R. (A.) 81; 24 Cr. L. J. 67, referred to.

Case reported by the Additional Sessions Judge, Kheri

Mr. *Harish Chandra*, for the Complainant.

Mr. *S N. Roy*, for the Accused.

ORDER.—This case has been referred by the learned Additional Sessions Judge of Kheri on the ground that the trial is vitiated by a failure to examine the accused as required by s. 342, Cr. P. C. The facts of the case are as follows. The prosecution evidence was recorded on 4th and 11th October 1924 and was concluded on the latter date. After the conclusion of the prosecution evidence the accused was examined in detail and a charge was thereupon framed under s. 500, Indian Penal Code. On 14th October the accused intimated a desire to further cross-examine the prosecution witnesses. These witnesses were re-called and cross-examined on 20th

October. The accused's statement was not recorded over again at the conclusion of the cross-examination. The accused called four defence witnesses and judgment was then pronounced.

The first question is whether the Court was bound to examine the accused for the second time on October 20th after the further cross-examination of the prosecution witnesses, and the second whether if so the omission to do vitiates the trial. It has been generally assumed since the recent amendment of the Cr. P. C that the answer to the first question is in the affirmative, but a Full Bench of the Madras High Court in *In re Varisai Routher* (1) has held by a majority of four to one that it is not necessary.

The reasoning on which the Court proceeded will appear from the following extract from the judgment of the learned Chief Justice.

"In a warrant case, which is all we are concerned with here, the procedure authorized by the Code is that the prosecution witnesses are called and can then be cross-examined on behalf of the accused and if necessary re-examined. The prosecution witnesses called at this stage are generally the whole prosecution evidence and the prosecution is closed. The Magistrate then either dismisses the case on the ground that no case is made out or, after questioning the accused generally to enable him to explain any circumstance appearing against him from the evidence, formulates a charge under s. 254, Cr. P. C. The charge is then read over and explained to the accused under s. 255 and he is asked whether he is guilty or has any defence to make. This procedure is directly in accordance with the Code, and it is difficult to see how any other is possible. It may be that the accused is not going to ask that the witnesses for the prosecution be re-called for cross-examination under s. 256, but proposes at once to call his evidence; or it may be that he is not going to call any evidence, but to rely on his address to the Court. In either event he will have been called on for his defence and by the words of the Statute, the questioning has to be after the termination of the prosecution evidence and before he is called on for his defence. It is true that, under s. 256, although he has not availed himself of the first opportunity of cross-examining prosecution witnesses, he can ask for them to be re-called for that purpose. That does not, in my judgment, make that cross-examination part of the examination of the prosecution witnesses within the meaning of s 342".

I am disposed to agree with this view.

There is, however, another ground on which this case can be decided. Even assuming that a further examination of the accused is necessary after the charge and after the prosecution witnesses have been re-called for cross-examination, I am in entire disagreement with the view of the Calcutta and Madras High Courts that the omission to make this further examination is an illegality which vitiates the trial without regard to whether the accused has been prejudiced or not. The authority of this Court to which the learned Sessions Judge refers, namely, the case of *Emperor* v. *Sheopal* (2) does not support that view, for in that case the conviction was set aside on the express ground that the accused had been prejudiced. In *Bechu Chaube* v. *Emperor* (3), Stuart, J., has taken the view that the examination, after the statements of the accused had been recorded, of a further prosecution witness whose evidence did not add materially to the evidence already given was merely an irregularity which did not in itself vitiate the trial. In the present case all the allegations which the accused had made were fully on the record at the time when the prosecution evidence was originally closed and his examination taken place. The cross-examination of the prosecution witnesses added nothing on which it was necessary to further examine him and the omission which has taken place, if it was an omission, has not prejudiced the trial in the very smallest degree. I, therefore, am unable to accept the reference but direct that the record be returned.

Z. K. *Reference not accepted.*

(1) 73 Ind. Cas. 163; 46 M. 449; 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 385; (1923) M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J. 517.

(2) 85 Ind. Cas. 943; 1 O. W. N. 833; 10 O. & A. L. R. 1381; 26 Cr. L. J. 655.

(3) 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; (1923) A. I. R. (A.) 81; 24 Cr. L. J. 67.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 95 OF 1924.

July 23, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

UDHARAM—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Interference by High Court with pending proceedings—Partnership—Dispute of civil nature between partners—Criminal prosecution, discouragement of.

The High Court is extremely reluctant to interfere in a preliminary stage, with the trial of an offence before a Magistrate. But it will interfere on occasions where the circumstances clearly call for its interference. [p. 247, cols. 1 & 2.]

It is proper that the Courts should look with much suspicion on criminal actions which are brought forward by partners of a still subsisting partnership against one another. By means of threats a prosecution may be made an extremely oppressive mechanism for compelling a partner to admit or to pay up a claim or enter into some compromise in a matter which is really one more suitable for settlement in a civil suit than a case for criminal prosecution. It is often the case that a merchant would rather, instead of being arrested under a criminal warrant and thus receiving a shock to his credit, be willing to pay up or admit a claim which he believes to be unjust. Such proceedings may often be very excessively oppressive, and the test to be applied to such cases is whether on reading the complaint it seems quite clear that the complainant does not aver that anything has happened which can be brought under any provision of the Penal Code. [p. 247, col. 2.]

JUDGMENT.—This is an application to quash certain legal proceedings now pending in the Court of City Magistrate, Sukkur, instituted by the complainant, Hiranand, against the accused Udharam on the 15th day of May 1924, which proceedings have only reached the stage at which a bailable warrant has been issued against the accused.

This is a case of a dispute between a capitalist and working partner and shortly the dispute being in respect of dealings by the accused who is the present applicant in respect of business at any rate connected with the firm's business.

We are extremely reluctant to interfere in these preliminary stages with the trial of an offence before the Magistrate. It is very difficult to find out on the allegations of the parties whether the criminal offence will possibly not lie. We do not wish to interfere much with the discretion of the Magistrates who are vested with ample powers to dispose of a case, before it is proceeded to its due termination, but we do interfere on occasions where the circumstances clearly call for our interference, and it would seem very proper that the Courts should look with much suspicion on criminal actions which are brought forward by partners of still subsisting partnership against one another. It is obvious that by the means of threats a prosecution may be made an extremely oppressive mechanism for compelling a partner to admit or pay up a claim or enter into some compromise in a matter which is really one more suitable for settlement in a civil suit than a case for a criminal prosecution. The matter may be clearly a matter for the Civil Courts and it would be very difficult for a Criminal Court to say on what side justice lies and it is often the case that the merchant would rather instead of being arrested under a criminal warrant and thus receiving a shock to his credit be willing to pay up or admit a claim which he believes to be unjust. This is particularly the case where the operations of the partnership are spread all over India and where it is possible that a warrant may be issued to arrest thereunder a partner who is in a very distant jurisdiction.

It is clear that such proceedings may often be very excessively oppressive, it is necessary, therefore, to criticize this complaint and apply the usual test whether on reading the complaint it seems quite clear that the complainant does not aver anything has happened which can be brought under any clause of the Penal Code.

Now what is alleged here is that the accused is the working partner of the firm in which the complainant and others are the capitalists that the work of the firm is in connection with the lac and other jungle products, in the course of that business the accused went up to where these products are to be found while he was there he entered into some disastrous private contracts in connection with the purified ferm of lac known as chapra, finding these speculations against him he implored the assistance of his Seth partners to pay up the loss which he had incurred as a private trader promising to meet them out of his private assets and admitting that these transactions were private transactions; the complainant, therefore, paid up Rs. 10,000 and the accused is now showing reluctance to stand by his

bargain and is attempting to assert that the transactions were not gambling transactions or at any rate not for his own private benefit but were legally binding on the firm.

Now if this story is true as told in the complaint as to which we express no opinion it appears that the accused has been behaving in a very unworthy manner.

Whether or no his actions can be brought under the Penal Code they are not the actions which would be done by the honest man and the loyal partner, but we do not see that there is anything which amounts to an offence of cheating even on the statement of the complainant. As a matter of fact the letters on which great reliance is placed do not seem to show that positive assertion of the liability of the firm was made, it is rather an *admiseri cordiam* appeal to the Seths that these transactions should be ratified by the firm or at any rate some allowance should be made to the accused in respect of these transactions but even apart from that question what was the false representation the accused made when he induced the complainant to part with his money he declared that he will be personally liable for the debt.

But if it was a separate transaction he is still liable for it if the promise had been that he would pass some negotiable instrument or enter into a written agreement or even make debit entry in the private accounts and the partnership accounts admitting or creating his personal liability and on the strength of that representation he had got the money then if he does not enter into these contracts or execute those instruments knowing all along from the time he got the advance on that representation, that he had no intention of fulfilling those promises, that of course would be cheating but a mere refusal to admit a legal liability, the existence of which does not depend upon admission by the person who is to be made liable, is not such a breach of the promise made at the time of the offence, as would amount to make false representation at the time of the advance.

It would seem, therefore, in view of what is said above, there is no hope that the accused will be convicted under s. 420, therefore, it is prudent to put an end to this case. We, therefore, quash the proceeding.

Z. K. *Proceeding quashed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 325 OF 1924.

August 14, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

A. H. TURNER—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 30, 467, 471—Counterfoil of paying-in-slip of Bank, whether valuable security—Using forged counterfoil as genuine—Offence, whether triable by Court of Session.

A counterfoil of a paying-in-slip which purports to be an acknowledgment of the receipt of a sum of money by a Bank and bears the impression of a stamp put upon it by the Bank Officials stating that the amount mentioned in the counterfoil has been received by the Bank is a valuable security within the meaning of the definition laid down in s. 30 of the Penal Code and a person who is charged with an offence under s. 471 of the Code with regard to such a document must, consequently, be tried by the Court of Session. [p. 249, col. 1.]

Appeal against an order of the Chief Presidency Magistrate, Calcutta, dated the 2nd June 1924.

Mr. *K. N. Chowdhury* and Babus *Mritunjoy Chottopadhya* and *Bhupendra Nath Das*, for the Appellant.

Babu *Tarakeswar Pal Chowdhury*, for the Crown.

JUDGMENT.

Mukerji, J.—The appellant was tried by the Chief Presidency Magistrate of Calcutta on charges under s. 468, Indian Penal Code, s. 471, read with s. 465, Indian Penal Code, and s. 420, read with s. 511, Indian Penal Code, or in the alternative under s. 385, Indian Penal Code. He has been acquitted of the charge under s. 468, Indian Penal Code, and convicted on the other charges. The learned Magistrate sentenced him to six months' rigorous imprisonment on the charge under s. 471, read with s. 465, Indian Penal Code, and to six months' rigorous imprisonment under s. 420, read with s. 511, Indian Penal Code, or in the alternative under s. 385, Indian Penal Code, the two sentences to run consecutively. It is not necessary for us in the present appeal to deal with the facts of the case inasmuch as at the very outset we are met with a difficulty which arises by reason of the fact that the document which the appellant is said to have used and in consequence of which the charge under s. 471, read with s. 465, Indian Penal Code, was framed is really one which is a valuable security within the definition of

that expression as contained in s. 30 of the Indian Penal Code. The document in question is a counterfoil of a paying in slip which purports to be an acknowledgment of receipt of a sum of Rs. 55,000 by the Bank at whose instance the proceedings in this case were instituted. It bears the impression of a rubber stamp put upon it by the Bank Officials stating that the amount mentioned in the counterfoil had been received by the Bank. On the face of the document, it purports to be an acknowledgment in respect of that amount and, therefore, purports to be an acknowledgment that the Bank is under a legal liability to hold the amount in deposit on behalf of the appellant and to pay it to him or at his requisition. It does not matter that it is not a stamped document. It is clear, therefore, that it comes within the definition of valuable security as laid down in s. 30, Indian Penal Code. The case was, therefore, one which was triable exclusively by the Court of Sessions and the learned Magistrate had no jurisdiction to deal with it in the way that he did.

We have been asked by the learned Counsel appearing on behalf of the appellant to go into the facts in order to determine whether there should or should not be a commitment in this case. Regard being had, however, to the fact that the appellant was convicted in respect of the offences mentioned above I think that a *prima facie* case has, as a matter of fact, been made out against him and, therefore, we should refrain from going into the merits.

In my opinion, the conviction and sentence passed on the appellant should be set aside and the case should be sent back to the learned Chief Presidency Magistrate. He will make a proper order committing the case for trial to this Court in the exercise of its Original Criminal Jurisdiction. Pending his trial the appellant may be released on bail to the satisfaction of the Chief Presidency Magistrate.

Walmsley, J.—I agree.

Z. K. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1069 OF 1924.

February 10, 1925.

Present:—Mr. Justice Zafar Ali.

MANGAL SINGH AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 100—Attack with lathis*—Apprehension of grievous hurt—Death caused in exercise of right of private defence—Offence.*

The accused, two brothers, while passing a certain way were attacked by three men armed with *lathis* and in the fight that ensued one of the accused inflicted a blow on the head of one of the assailants which proved fatal. Several injuries had been caused by the assailants to the accused :

Held, that under the circumstances the accused had every reason to apprehend that grievous hurt might be caused to them by their assailants, and that they were, therefore, justified in striking in self-defence in the manner in which they did and were not guilty of any offence. [p. 250, col. 1.]

Criminal appeal from an order of the Magistrate, First Class, Kasur, District Lahore, dated the 1st December 1924.

Dr. *Nand Lal*, for the Appellants.

JUDGMENT.—The two brothers, Mangal Singh and Fauja Singh, have been tried together and convicted, the former under s. 304, part II, and the latter under ss. 325/109, Indian Penal Code, and sentenced to rigorous imprisonment for seven years and five years respectively. They have appealed through Dr. Nand Lal who contends that the solitary injury received by the deceased Kesar Singh which proved fatal was inflicted by Mangal Singh in exercise of his right of private defence and that Fauja Singh, his brother, could on no account be held responsible for the same. This contention receives considerable support from certain conclusions arrived at by the Court below and also from all the surrounding circumstances.

There can be no doubt that the deceased Kesar Singh, and his uncles, Surain Singh (P. W. No. 1) and Deva Singh (P. W. No. 6) had reason to be inimical to the accused because they suspected that a nephew of the latter had stolen a she-buffalo of Surain Singh. On the fateful day Dewa Singh was returning to his village in the afternoon riding on a horse when Mangal Singh accused met him and attacked him with a stick inflicting a blow on his shoulder. Dewa Singh galloped off and thus saved himself from receiving further blows. It was on the ensuing evening

that Kesar Singh received the fatal injury. The question is, under what circumstances did he receive it ?

The prosecution theory was that both the accused came armed with sticks and attacked Kesar Singh while he was sitting at the village pond near his she buffaloes, that they kept beating him even after he had been knocked down and lay on the ground and that Sundar Singh and Sadru Machhi rescued him and beat off the accused with their sticks. If this were true, the deceased must have received more injuries than one, but the medical evidence established that he bore only one injury. The lower Court found that this part of the prosecution story was false and it further found that Sadru and Sunder Singh were not present at all at the fight. They were obviously introduced to account for the injuries which the accused had received. According to the medical evidence Mangal Singh had as many as nine injuries and Fauja Singh had three Their defence was that in the first place Dewa Singh fought with Mangal Singh and that subsequently Dewa Singh went to the village and there in company with his brother Surain Singh and nephew Kesar Singh attacked Mangal Singh and Fauja Singh when they passed that way. As according to his own showing Dewa Singh had received an injury at the hands of Mangal Singh, the accused version appear to be true, and the prosecution story that the accused made an unprovoked attack upon Kesar Singh and that Surain Singh and Kishan Singh, though they were on the spot, did not go to his rescue and did not intefere at all is on the face of it highly improbable.

What appears to have happened was that Dewa Singh, Surain Singh and Kesar Singh lay in wait for Mangal Singh to chastise him for his assault upon Dewa Singh and that as Mangal Singh came up that way accompanied by his brother Fauja Singh, the three men fell upon Mangal Singh. Fauja Singh naturally interfered on behalf of his brother Mangal Singh. In the fight that ensued Mangal Singh inflicted a blow on the head of Kesar Singh which proved fatal. As Mangal Singh was attacked by three men who were armed with *lathis*, as indicated by the injuries inflicted he had every reason to apprehend that they might cause grievous hurt to him and was, therefore, justified in striking in self-defence in the way he did, and under these circumstances Fauja Singh could not be held responsible at all for the blow inflicted by Mangal Singh.

The prosecution story has been found to be false in material particulars, while the accused's version is probable and is supported by Bur Singh who according to the testimony of Kishan Singh (P. W. No. 2) was an eye-witness of the occurrence. In view of all these facts and circumstances the conviction of neither of the accused is maintainable. I, therefore, accept the appeal set aside the convictions and sentences, acquit the appellants and order that they be released from Jail forthwith.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 25 OF 1925.

March 5, 1925.

Present :—Mr. Dalal, A. J. C.

HAZARI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), ss. 5, 9 (g)—Rules framed by U. P. Government, rr. 25, 48A—Conditions of license, No. 18—Licensed vendor of opium—License fee, failure to pay—Notice, absence of, effect of—Failure to write up accounts—Offence.

A licensed vendor of opium becomes liable to pay the license fee only on receipt of notice and in the absence of such notice he cannot be held criminally liable for failure to pay the license fee. [p. 251, col. 1.]

A licensed vendor of opium who fails to write up the accounts for a particular day as soon as the transactions for that day have been closed is guilty of an offence under s. 9 (*g*) of the Opium Act. [*ibid.*]

Criminal application against an order of the Additional Sessions Judge, Baraich, dated the 6th November 1924, upholding that of the Magistrate, First Class, Baraich, dated the 18th September 1924.

Mr. *H. N. Dass*, for the Applicant.

The Government Pleader, for the Opposite Party.

JUDGMENT.—It is strange that neither of the subordinate Courts should have made a note of the harassing conduct of Babu Rup Kishore Khanna, Excise Inspector. That man brought three charges against the applicant, Hazari, retail license-vendor of opium:

(1) That he kept packets of opium in his shop of short weight;

(2) That he failed to pay license fee as required by law, and

(3) that he had not written up accounts of the 10th and 11th of July.

The first charge was found to be false.

The packets were all found of proper weight in the Court of the Deputy Magistrate. As regards the second charge the applicant became liable to pay license fee only on receipt of notice and without such notice he could not be held criminally liable for failure to pay license fee. The Inspector, if he was worthy of his duties and not merely intent on getting up criminal cases to show off his work, ought to have known this. It appears to me scandalous that a licensed vendor should be prosecuted and put to enormous amount of trouble and expense on such false charges.

The applicant's conviction is upheld by the learned Sessions Judge for not writing up accounts of the 10th and 11th of July. Under r. 25 of Rules framed by the Local Government under s. 5 of the Opium Act and gazetted (part I, page 915, U. P. Gazette, 18th July (1914) a person to whom a license has been granted by the Collector may sell opium by retail in accordance with the conditions specified in r. 48-A. This Rule was framed and gazetted on 8th June 1922. Condition 18 of the conditions governing license is that regular and accurate accounts shall be maintained by the license-holder and that such accounts shall be written up as soon as the transaction for each day has been closed. Under s. 9 (*g*) of the Opium Act a breach of this rule will be penal.

The conviction, therefore, for not writing up accounts as soon as the transactions of the 10th and 11th July were over must be maintained.

At the same time bearing in mind the two false charges brought against the applicant and the present charge being due more to neglect than to dishonesty I reduce the fine to Re. 1. The balance of fine, if any recovered, shall be refunded. I am informed that the applicant has already paid the fine of Rs. 50.

Z. K. *Fine reduced.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 844 OF 1924.

November 25, 1924.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice Mukerji.

KALISADHAN ADDYA—PETITIONER

versus

NANI LAL HAZRA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 476-B—Penal Code (Act XLV of 1860), s. 193—Complaint, refusal to make—Superior Court, reversal of order by—Reasons for reversal—Complaint in respect of perjury—Particulars.

Where a Superior Court reverses an order of a Trial Court refusing to proceed under s. 476 of the Cr. P. C sufficient reasons must be given by the former Court as to why it thinks that the discretion was not properly exercised by the Trial Court. [p. 252, col. 1.]

Where a complaint is made by a Court under s. 476 of the Cr. P. C., in respect of an offence under s 193 of the Penal Code, the complaint must contain the particulars of the offence in respect of which it is made. [*ibid.*]

Criminal revision against an order of the Sessions Judge, 24-Pargannas, dated the 12th September 1924.

Mr. *Santosh Kumar Bose*, for the Petitioner.

The Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The Rule has been issued to show cause why the order passed by the Sessions Judge of the 24-Pargannas, dated the 12th September 1924, should not be set aside, or such other or further order passed as to this Court may seem fit. The order in question was passed by the learned Sessions Judge under the provisions of s. 476-B of the Cr. P. C.

The petitioner was the complainant in a case under s. 406 of the Indian Penal Code which he had instituted against one Nani Lal Hazra. The case was tried by the Honorary Magistrate, Rev. K. P. Banerjee, who, on the 23rd May 1924, acquitted the accused, Nani Lal, on the charge on which he was tried. On an application made by the accused, Nani Lal, the petitioner was called upon to show cause as to why he should not be prosecuted under the provisions of s. 476 of the Cr. P. C. The petitioner showed cause, and the learned Honorary Magistrate, on the 11th July 1924, after hearing the petitioner, passed an order to the effect that he did not wish to prosecute the petitioner. The accused Nani Lal thereupon preferred an appeal, under the provisions of s. 476-B of the Cr. P. C., to the learned Sessions Judge, and the learned Sessions Judge, on the 12th Sep-

tember 1924, passed the order which forms the subject matter of this Rule.

The relevant portion of the order of the learned Sessions Judge, wherein he gives his reasons for making the order which is complained of, runs in these words: "The learned Pleader for the petitioner urges that it has been shown that the opposite party made deliberate false statements. They are detailed in the petition (meaning the petition presented by the accused Nani Lal in his Court). The opposite party has appeared. The cause shown is not sufficient. The appeal will be allowed. Let a complaint be made to the Magistrate directing the prosecution of the opposite party under ss. 211 and 193 of the Indian Penal Code"

Whatever may be said to be the justification for the order which the learned Sessions Judge passed in this matter, he does not appear to have dealt with one very important question which arises in a case of this nature, namely, in a case where the discretion vested in the Trying Magistrate is exercised by that Court in refusing to make an order under s. 476. Where a Superior Court reverses the order of the Trial Court refusing to proceed under s. 476 of the Cr. P. C. sufficient reasons must be given by that Court as to why he thinks that the discretion was not properly exercised. In the present case it does not seem that the learned Sessions Judge directed his attention to this matter at all. On this ground, therefore, it seems to us that the order passed by him should be set aside.

There is a further matter to which our attention has been drawn by the learned Vakil for the petitioner, and that is the form in which the complaint was actually sent to the Magistrate by the learned Sessions Judge. In the copy of the complaint that is to be found on the record the particulars of the offence under s. 193 of the Indian Penal Code do not appear to have been set out. That is absolutely necessary in view of the definition of complaint as contained in the Cr. P. C.

For all these reasons, we think that the order passed by the learned Sessions Judge on the 12th September 1924 should be set aside. The Rule is accordingly made absolute.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1108 OF 1923.

April 4, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Fforde.

MOHAMMAD AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT

Evidence Act (I of 1872), ss. 32 (3), 145, 161—Deceased person's statement, when admissible against third persons—Weight of such statement—Criminal Procedure Code (Act V of 1898), ss. 162, 172—Practice of comparing statements of witnesses made in Court with statements made to Police condemned—Statements made to Police when and how to be used by Courts—Object of s. 172 (2), Criminal Procedure Code.

The statement of a deceased person, so far as it is against the pecuniary or proprietary interest of that person, is admissible under sub-s. (3), s. 32, Evidence Act, not only against that person but also against persons mentioned or referred to therein, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant. [p. 256, col. 1.]

Although in cases of the above kind the whole statement of a deceased person is admissible in evidence, the value which the Court will attach to such evidence will depend in each case upon a variety of circumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth, also the circumstances under which it came to be made; and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. [p. 256, cols. 1 & 2.]

The practice of Criminal Courts of comparing statements made by witnesses in Court under oath, with statements which they are alleged to have made to the Police during the course of the investigation held by the Police prior to the trial cannot be too strongly condemned. [p. 257, cols. 1 & 2.]

A statement made by any person to a Police Officer in the course of a criminal investigation can only be used at the trial in strict accordance with the provisions of s. 162 of the Cr. P. C. [p. 257, col. 2.]

The object of sub-s. (2) of s. 172, Cr. P. C., is to enable the Court to direct the Police Officer who is giving his evidence, to refresh his memory from the notes made by him in the course of his investigation of the case, or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court. If used for the latter purpose the provisions of ss. 145 and 161 of the Evidence Act shall apply. [p. 258, col. 1.]

The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made evidence in accordance with these statutory provisions, no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial. [*ibid.*]

Appeal from an order of the Sessions Judge, Shahpur at Sargodha, dated the 31st August 1923.

Sheikh *Abdul Qadir*, K. B., Messrs. *B. R. Puri*, *Sagar Chand*, *J. L. Kapur*, and *R. C. Soni*, for the Appellants.

Lala *Jai Lal*, R. B., Government Advocate, for the Respondent.

JUDGMENT.

Fforde, J.—Seven persons, namely, Muhammad, Yaru, Asghar, Gul Jahanian, Umra, Sher Bahadur and Khan Muhammad, have been tried by the Sessions Judge of Shahpur under the provisions of s. 396 of the Indian Penal Code of having committed a dacoity with murder on the night of the 26th or early morning of the 27th December 1922. Of these persons Umra, Muhammad, Asghar, Gul Jahanian and Yaru have been sentenced to death, and Sher Bahadur and Khan Muhammad have been acquitted. The first five convicts now appeal against their convictions and sentences, and the Crown appeals against the acquittal of Sher Bahadur.

The story of the prosecution is that on the night or early morning in question these men with others came to the village of Mitha Tiwana for the purpose of carrying out a scheme of robbery which had been suggested by Umra to a certain Misri who, in turn, arranged to procure bandits who were to help in carrying out the enterprise. The Crown case depends mainly upon the evidence of *Musammat* Sahib Devi (P. W. No. 3), the discovery of various portions of the booty under circumstances implicating the respective accused persons, the evidence of a tracker, and a statement by Misri alleged to have been made to Lala Buta Ram, Inspector of Police in the Criminal Investigation Department (P. W. No. 22).

Musammat Sahib Devi's evidence is shortly as follows:—She says that on the night in question she was sleeping in her house with her children when some one pushed the door which was chained from inside. Her husband was away at Khushab. When the door was first pushed she thought that her husband had returned. Presently, however, one of the shutters fell on the ground and a man stepped inside and stood by the head of her *charpoy*. She asked him who he was, whereupon the intruder told her to keep quiet. Another person then entered the room and put his hand on her mouth. On her removing his hand he caught her by the throat. A third man then came in and struck her with a *dang* on the right side. He was followed by two others, As the witness cried out for help the man by the head of the *charpoy* drew a knife whereupon the witness offered her jewelry if they spared her life. At this stage two more men came in making seven in all. The witness then accompanied them into her inner *kotha* with a lantern. She showed the two *dabbas* containing jewelry and a small box containing both jewelry and money. This the robbers proceeded to remove. The robbers then asked the witness to produce cash from the house and demanded the keys of the safe. Upon her explaining that she had no keys and had already shown them all the valuables in the place they again threatened her life but ultimately appeared to come to the conclusion that she was speaking the truth. Having looted such articles as they could lay their hands upon, including clothes and jewelry, the intruders disappeared by the stairs leading to the top of the house. The witness states that the dacoits were with her for an hour or three-quarters of an hour. She had ample opportunity of studying their features and was subsequently able to identify Asghar, Muhammad, Gul Jahanian, Umra and Yaru, and explained the part which each of these persons took in the proceedings described. She identified these five persons before the Tahsildar at Mitha Tiwana and she also identified them before the Committing Magistrate. In addition she recognized as property stolen from her room various articles of jewelry and clothing subsequently produced by the accused.

This woman was subjected to a long and searching cross-examination by three of the Counsel for the defence. This cross-examination, including questions by the Court, takes up some five pages of printed matter in the paper-book before us. But the witness throughout this exhaustive test remained unshaken in her evidence, and I can see no reason to doubt the truth of her statements.

While these events were taking place on *Musammat* Sahib Devi's premises, two persons, one named Samanda, who is absconding, and another described as a man of Jabbi, the former armed with a file and the latter armed with an ordinary gun were keeping guard on the roof. It has been proved that shots were fired from one of

the roofs which caused the death of two youths, Sarup Singh and Makhan Singh.

Evidence of the circumstances under which various ornaments, etc., forming part of the stolen booty, were produced by various members of the raiding party is given by, amongst others, Sher Muhammad (P. W. No. 23), a pensioned *jamadar*. This witness also was subjected to a very long and searching cross-examination by Mr. Puri and Mr. Ghani, and was also closely questioned by the Court, and again, I can find no reason for doubting the credibility of the witness. He proves that each of the five persons, Asghar, Umra, Yaru, Gul Jahanian and Muhammad produced from different hiding places articles afterwards identified as having been stolen in the raid in question under circumstances which indicate the complicity of each of these men in the robbery.

The evidence of the production of certain ornaments is specially incriminating. For instance, as regards a golden *kadhi* stolen from *Musammat* Sahib Devi's house, Umra produced one piece, Gul Jahania another piece, and Yaru a third piece, of a golden *chaupkali* Umra produced four pieces Yaru three pieces and Asghar two pieces; of a golden *kanth mala* Umra produced nine pieces, Yaru eight and Asghar twelve, of a golden *kantha* Umra produced one piece and Yaru another. Umra again produced one *pathri* or a golden *naurakha*, Gul Jahanian one *dholni* of the same, Yaru another *dholni* and Asghar two small *tawitris*. Of a golden *kantha* one piece was produced by Sher Bahadur and another by Umra. Umra produced three pieces of a silver *jhebe*. Umra produced two *kubes* and one *nali* while Yaru produced four *kubes* and a *nali*. It appears from this that cretain stolen ornaments were broken up and distributed amongst these five persons. Muhammad took a number of witnesses from Mitha Tiwana to a place called *ghatti* were in a dry *nala* he dug up an earthen pot containing four pieces of clothing which were subsequently identified as the property of Jiwan Das. Other witnesses corroborate the evidence of the discovery of the incriminating articles and it is unnecessary to recapitulate it; their evidence is of a highly significant and reliable character and, in my opinion, is an important link in the damning chain of evidence produced by the prosecution.

Finally there is the evidence of Lala Buta Ram (P. W. No. 22) who proves a detailed statement made to him by Misri showing the manner in which the dacoity was planned and the part taken in it by certain of the accused. According to Misri's statement he and Umra carried out the robbery with the aid of Gul Jahanian, Khan Muhammad, Asghar, Muhammad, and some other persons whom he names as Samanda, Batkala, Shera, Alu, Nura and Allah Yar. Of the persons concerned in the present appeals Misri does not appear to have named either Sher Bahadur or Yaru. Yaru is a first cousin of Misri, and it is quite probable that the latter substituted another name in place of this man. It is true he mentioned his own brother Muhammad, but it was after Muhammad's tracks had been found and identified. The omission of Sher Bahadur's name by Misri is not explained. So far as this piece of evidence is concerned Sher Bahadur, therefore, is not affected by it.

It is urged by the defence that Misri being dead second-hand proof of his evidence is inadmissible; and it is clear that unless Misri's statement comes within the scope of s. 32 (3) of the Indian Evidence Act it could not be given in evidence at all. Section 32 of the Act provides that "Statement, written or verbal,... made by a person who is dead...are themselves relevant facts" in certain cases. One of these cases is "When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages" (sub-s. 3). There is no doubt that the statement in question, so far as Misri is concerned, would have exposed him to a criminal prosecution or to a suit for damages, and, therefore, would be admissible as a piece of evidence in any proceeding in which such evidence was relevant to the issue or issues being tried in such proceeding. But Counsel for the defence urged that only that portion of the statement which affected Misri himself is admissible under this sub-section and that those portions of the statement which affect other persons should be excluded. His argument shortly, is that so much of Misri's statement as refers to the participation of other persons in the crime is not a statement which would expose or would have exposed Misri to a

criminal prosecution or to a suit for damages, and, therefore, does not possess that supposed guarantee of truth upon which the admissibility of such evidence is based, Counsel for the Crown, on the other hand, has argued that where a statement, a portion of which comes within the purview of sub-s. (3) contains matter which does not come within that purview but which read as a whole makes a consecutive narrative, the whole of such statement must be admitted. This raises a question of great importance to the administration of criminal law in this country. It is not only of importance in the present case but in a great many other cases. It frequently occurs that a witness is tendered in evidence to prove that a man, who is deceased, made a statement to the effect that he took part in a certain crime, and in the course of that statement declared that other persons had participated with him in that crime. In criminal proceedings against those other persons in respect of that crime, the Crown case is often largely dependent upon the statement of the deceased person implicating the accused and if the statement of the deceased is not admissible as against the accused the prosecution would in many cases fail. I do not suggest that in the present case the statement of Misri is essential to support the convictions, as I am satisfied that the rest of the evidence on the record establishes the guilt beyond any reasonable doubt. As the question, however, has been raised and argued at considerable length, and as the Government Advocate is anxious that a decision should be given on this point of law. I have thought it necessary to examine all the authorities which have any bearing on the point and to state what I conceive to be the law.

The first part of sub-s. (3) of s. 32 of the Indian Evidence Act enacts the well-known principle of the English Law of Evidence established in *Higham* v. *Ridgway* (1). The principle laid down in that case has been followed by a long line of authorities in England most of which are referred to in Vol. II of the 12th Edition of Smith's Leading Cases in the notes to *Higham* v. *Ridgway* (1). In *Gleadow* v. *Atkin* (2), Bayley, J. states the rule as follows:—"An entry by a man who is dead, will be evidence as to strangers, if it relates to a fact peculiarly within his knowledge, if he had no interest in misrepresenting it: or if the entry either charges him with the receipt of money for a third person, or imports that a debt, which would otherwise be due to him, is paid."

In *Smith* v. *Blakey* (3), Blackburn, J., makes the following remarks: "No doubt, if any part of the entry is against the interest, the whole is admissible in evidence, as was held in the well-known case of *Higham* v. *Ridgway* (1)."

In *Reg.* v. *Overseer of Birmingham* (4), Cockburn, J., states "I should be prepared to say, that as soon as it is established, which it now is, on the authority of *Higham* v. *Ridgway* (1) and the other cases, that you may receive the declaration of the deceased person, as showing, not only something adverse to his interest, but all incidental facts contained in that declaration, so as far as they are not foregin to it, it follows as a consequence that those collateral facts may be proved by the declaration."

In *Davies* v. *Humphreys* (5), Parke, J., (afterwards Baron Parke) said:—"The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry and connected with it."

Hayes, J., in *Queen* v. *Exeter* (6) expressed himself as follows:—"Having regard to the great changes that have in recent times been made in admitting the evidence of the interested witnesses, when alive, it would be most objectionable to lay any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer, and where the Courts are frequently obliged to supply the want of evidence by presumptions."

In Sir James Stephen's Digest of the Law of Evidence under Art. 28, the learned

(1) (1808) 10 East. 109; 10 R. R. 235; 103 E. R. 717.
(2) (1833) 1 Cr. & M. 410 at p. 421; 3 Tyr. 289; 2 L. J. Ex. 153; 38 R. R. 635; 149 E. R. 459.
(3) (1867) 2 Q. B. 326 at p. 330; 8 B. & S. 157; 36 L. J. Q. B. 156; 15 W. R. 492.
(4) (1861) 1 B. & S. 763; 31 L. J. M. C. 63; 8 Jur. (N. S.) 37; 5 L. T. 309; 10 W. R. 41; 121 E. R. 897; 124 R. R. 736.
(5) (1840) 6 M. & W. 153; 9 L. J. Ex. 265; 4 Jur. 250; 151 E. R. 361; 55 R. R. 547.
(6) (1869) 4 Q. B. 341.

author declares that "the whole of any such declaration, and of any other statement referred to in it is deemed to be relevant, although matters may be which were not against the pecuniary or proprietary interest of the declarant; but statements not referred to in, or necessary to explain such declarations are not deemed to be relevant merely because they were made at the same time or recorded in the same place."

It is clear from these, and other authorities which it is not necessary to refer to in detail, that so far as a statement against the pecuniary or proprietary interest of the person making it is concerned such statement may be given in evidence against third persons, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant.

This principle of English Law has been embodied in the Indian Evidence Act together with an extension of that principle which English Courts have refused to adopt, namely, the inclusion of statements which would have exposed the maker to a criminal prosecution or to a suit for damages. It follows, therefore, that this extension, enacted in sub-s. (3) of s. 32 of the Evidence Act, must be subject to same principles of law which in England have been held to apply to the principle embodied in the first part of the sub-section. I must accordingly hold that the whole of Misri's statement so far as it refers to or explains the part which he himself admits to having taken in the crime, is admissible in evidence against such of the accused in the present case as he names in that statement. I need hardly add that although in cases of this kind the whole statement of a deceased person is admissible in evidence the value which the Court will attach to such evidence will depend in each case upon a variety of cricumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth also the circumstances under which it came to be made; and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. These are all matters which affect the weight of the evidence and not its admissibility.

There is one other matter which I feel it my duty to refer to, although I do so with considerable reluctance, that is, to comment on the judgment of the Sessions Judge. The judgment is unique in this respect, that in the case of each convict elaborate reasons are given why the evidence for the prosecution should not be believed and then having apparently satisfied himself that the case presented for the Crown does not warrant the conviction the learned Sessions Judge proceeds to convict five of the accused and to sentence them to death. But the matter does not rest there. In order to discredit the evidence of the Crown witnesses the Sessions Judge has throughout his judgment relied upon entries in the Police diaries which were not made evidence in the only manner in which they could be so made, namely, under the provisions of s. 162 of the Cr. P. C., and he has in many instances mis stated the contents of these diaries. At page 162 of his judgment commencing from line 48, the Sessions Judge criticised the evidence of *Musammat* Sahib Devi on material which is not evidence on the record. Not only has he had recourse to the Police diaries for this purpose, in direct violation of the provisions of the Cr. P. C., but he has gone so far as to incorporate in his judgment a report alleged to have been sent by Lala Buta Ram to the Superintendent of Police on the 28th of December. This document is described as a report and is a rough summary of the circumstances of this crime, which was then, in course of investigation, furnished by a Police Officer to his superior. The Police Officer who made the report was not cross-examined upon it. It was not referred to in the course of the trial, and it has not been made, nor could it have been made, substantive evidence in the proceedings. It has not been translated nor does it appear anywhere upon the printed record. On examining the document, however, I find that it bears an endorsement "read out and admitted in evidence and transferred to the file of the Sessions Court." This endorsement is signed by the Sessions Judge. It is clear that the statement under the hand of the Sessions Judge that this report had been

read out and admitted in evidence is false, and I find it hard to understand how it came to be made. It is upon this report, and upon entries alleged to occur in the Police diaries, that the Sessions Judge has thought fit to cast doubt upon the truth of some of *Musammat* Sahib Devi's statements made in the witness-box. The statements in question appearing in the *ziminis* have not been in any way made evidence and do not appear upon the record. The same procedure of comparing the statements of witness made upon oath in Court with previous statements of the same witness alleged to have been recorded in the Police diaries has been adopted by the Sessions Judge with regard to a number of other witnesses. The irregularities of a like nature, which occur throughout this judgment, are too numerous to be dealt with here, and indeed are not material to the decision of these appeals. Other highly improper comments appear in the course of the judgment, one of which appears at page 163 to the effect that a certain witness, namely, Officiating Sub-Inspector Muhammad Nawaz, "has reverted and is under a cloud at present."

In many parts of the judgment the evidence is mis-stated, as for instance, at pages 166-176, the Sessions Judge, states :—"According to the prosecution there were bullet marks at four places, though unfortunately only one bullet has been produced." In point of fact it has been proved that four bullets were produced, one by Ghulam Resul P. W. No. 41 and three by P. W. No. 49, Tola Ram.

At page 169, the Sessions Judge, states that *Musammat* Sahib Devi was not asked to identify the sword which has been exhibited as P 27. On referring to her evidence at page 11, line 42, I find that she has stated as follows:—"The sword P-27 is the same which one of the accused had."

It would take too long to state in detail the many irrelevancies, inaccuracies and improprieties (including undeserved strictures upon Police Officers) which appear in the judgment in question, and I need only say that, if the learned Judge was sincere in his criticism of the evidence for the prosecution given in Court, it is hard to understand how he came to convict the persons under trial. The practice, which he has adopted of comparing statements made by witnesses in Court under oath, with statements which they are alleged to have made to the Police during the course of the investigation held by the Police prior to the trial, cannot be too strongly condemned.

A statement made by any person to a Police Officer in the course of a criminal investigation can only be used at the trial in strict accordance with the provisions of s. 162 of the Cr. P. C. That section before it was amended by the Cr. P. C. Amendment Act (XVIII of 1923—which came into force on the 1st September 1923, after the decision of the Trial Court in the present case) provided that no written statement made to a Police Officer in the course of an investigation shall be used as evidence, subject to the proviso that when any witness is called for the prosecution whose statement has been taken down in writing, the Court shall on the request of the accused refer to such writing and may then, if it thinks it expedient in the interest of justice, order a copy to be furnished to the accused and such statement may be used to impeach the credit of the witness in manner provided by the Indian Evidence Act, 1872. In other words, a statement made to a Police officer could only be made evidence when used for the purpose of cross-examining the person who made the statement. The amended section has cleared up a number of misapprehensions, which seem to have prevailed as to the scope of this section, by enacting that no statement whether contained in a Police diary or otherwise, nor any part of it, shall be used for any purpose at an enquiry or trial in respect of any offence under investigation at the time when such statement was made, except that when a witness is called for the prosecution, the Court shall, on the request of the accused, furnish him with a copy of the statement of any such witness for the purpose of testing the credit of the witness in the manner provided by s. 145 of the Indian Evidence Act. There is a further proviso that the Court may exclude from the copy of the statement furnished to the accused any matter which it thinks is not relevant to the subject-matter of the trial, or, is not essential in the interest of justice, and which in the public interests it is inexpedient to disclose. The confusion as to the legitimate use of Police diaries at criminal trials is possibly due in some measure to the rather ambiguous phraseology of s. 172 of the Cr. P. C., (which has not

been touched by the amending Act). Sub-section 2 of this section provides that any Criminal Court may send for the Police diaries of a case at the trial "and may use such diaries not as evidence but to aid it in such enquiry of trial." The object of this sub-section is to enable the Court to direct the Police Officer who is giving his evidence, to refresh his memory from the notes made by him in the course of his investigation of the case, or to question him as to contradictions which may appear between statements so recorded and the evidence he is giving in Court. If used for the latter purpose the provisions of ss. 145 and 161 of the Indian Evidence Act shall apply. The Court may also use the diaries in the course of the trial for the purpose of clearing up obscurities in the evidence or bringing out relevant facts which the Court thinks are material in the interests of a fair trial. If the statements in question, however, have not been made evidence in accordance with these statutory provisions, no Court has the right to refer to them subsequently for the purpose of coming to a judicial decision upon the case which is under trial or enquiry. As I have already pointed out in the case before us the Trial Court has based its conclusions of fact upon statements alleged to appear in the diaries of Police Officers to the disregard of the legal evidence given at the trial, namely, the sworn testimony of witnesses in Court. It might appear on an examination of these Police diaries that the statements therein contained do not contradict in any essential particulars the evidence given by the witnesses in Court, but this is not a matter for this Court to consider. We have only to deal with the legal evidence properly brought upon the ecord and upon the whole of that evidence I am clearly satisfied that the appellants, Umra, Muhammadu, Asghar, Gul Jahanian and Yaru have been rightly convicted.

I would accordingly dismiss the appeal of the five appellants and confirm the sentences passed upon them.

Shadi Lal, C. J.—I concur in the judgment prepared by my learned colleague and desire to make only a few observations on the question of law debated before us. The general rule of the law of evidence is undoubtedly to the effect that witnesses should depose to the facts within their own knowledge and not to those which they have only heard stated by other persons. In other words, the evidence, which can be admitted by a Court of Law must be direct and not second hand.

There are, however, several exceptions to this general rule, and one of the exceptions makes declarations against interest admissible in evidence. The interest involved must, according to the English Law, be one of a pecuniary or proprietary nature; no other interest will suffice. But the Indian Law, as laid down in sub-section (3) of s. 32 of the Indian Evidence Act, extends the scope of this exception and puts a penal interest on the same footing as a pecuniary or proprietary interest.

There can be no doubt that Misri's statement would have exposed him to a criminal prosecution and also to a suit for damages, and that the statement in so far as it is prejudicial to the penal interest of the maker is admissible in evidence. The question arises whether the rest of the statement, which is not against his interest, can be admitted along with the portion which is adverse to his interest. Now, if the matter were *res integra*, I would answer the question in the negative. The reason for the exception to the rule against second hand evidence is that a man is not likely to make a false statement against his own interest. Self-interest is supposed to be the best guarantee of truth. But this reason does not wholly apply, when a person, while making a declaration prejudicial to his own interest says something which is injurious to other persons.

Cessante ratione cessat ipsa lex.

The English Courts have, however, laid down in a series of judgments that the declaration may be accepted, not merely as to the specific fact against the interest of the declarant, but also as to all connected facts which, though not against his interest, are necessary to explain, or are expressly referred to by the declaration against interest. As observed by Lord Blackburn in *Smith* v. *Blakely* (3), the statement is admissible as evidence, not only of the precise fact which is against interest, but of all matters involved in or knit up with the statement. But disconnected facts even though contained in the same document or statement. are inadmissible. This is the principle enunciated by the Courts in England with respect to the scope of the declarations against pecuniary or proprietary interest, and the same rule must be

adopted in India as governing the scope of all the declarations rendered admissible by sub-s. (3) of s. 32 of the aforesaid Act.

I accordingly hold that Misri's statement inculpating the prisoners has been rightly admitted in evidence, and I endorse the view of my learned colleague on all other matters discussed in his judgment.

S. D. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 44 OF 1925.

April 1, 1925.

Present:—Mr. Kennedy, J. C., and Dr. DeSouza, A. J. C.

PURSU AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 517—Coins, whether property—Cash found on thief, disposal of—Procedure.

Cash is not property within the meaning of s. 517 of the Cr. P. C. except in so far as it is capable of being possessed and identified *in specie*. If it is certain that the actual coins found on a thief or receiver of stolen property are the actual coins which have been the subject of theft, then it is permissible to treat such cash as stolen property. It is, however, safer in such a case to inflict a fine and to apply the coins found on the person of the accused towards the payment of fine and then to apply the amount of the fine, if necessary, towards compensation. But in no case can coins which have been put into circulation and passed on to the public be treated in the same way as stolen coins actually remaining in the possession of the thief. [p. 259, col. 2.]

The doctrine of *caveat emptor* does not apply to currency coins. [*ibid.*]

Appeal against the judgment of the Additional Sessions Judge, Hyderabad, (Sind), dated the 3rd February 1925.

Mr. *C. M. Lobo*, First Assistant Public Prosecutor, for the Crown.

JUDGMENT.—This was an appeal by Pursu and Chain in respect of their conviction for offences under ss. 381 and 454, Indian Penal Code, the Additional Sessions Judge having sentenced Pursu to four years' rigorous imprisonment and Chain to six months. Those appeals were dismissed by the Bench of this Court. But the same Bench on pursuing the record being of the opinion that the order of the learned Additional Sessions Judge in respect of the disposal of property is wrong, directed notice to issue and it now remains for us to pass orders.

The property actually stolen was money collected by some *Tapedars* in respect of land revenue and there was in Court produced a considerable sum in cash. As regards that the order of the learned Additional Sessions Judge is "most of the monies lost were Government property in the custody of the *Tapedars*. The exact amount of such Government monies is not proved. All the property lost did not belong to Dulomal from whose house it was stolen." And accordingly he ordered it to be sent to the District Magistrate under s. 518 of the Cr. P. C.

It appears on perusing the record that the property so dealt with is not only cash found on both the accused but also monies which had been paid in the ordinary course of business to some prostitutes. It is necessary, therefore, to point out that cash is not, strictly speaking, property except in so far it is capable of being possessed and identified *in specie*. If it is certain that the actual coins found on the thieves or receivers of stolen property are the actual coins which have been the subject of theft then it is permissible to treat such cash as stolen property. In this case the learned Additional Sessions Judge seems to have been convinced that the property actually found in the possession of the two thieves were the specific coins which had been stolen from the complainants. In that case his order is within the verge of legality, though even so it is often safer, to inflict a fine and to apply the coins found on the person of the accused towards the payment of fine, and then to apply the amount of fine if necessary to compensation. But in no conceivable way can coins which have been put into circulation and passed on to the public be treated in the same way as stolen coins actually remaining in the possession of the theives. It is obvious that to allow such a doctrine to prevail would be most disastrous. It being impossible for any body to recognise coins, at any moment any of us might find himself being charged as being in possession of or receiver of stolen property and required to refund to the original possessor large sums of monies which we may have taken in perfectly good faith. *Caveat emptor* never applies to currency coins. The order of the learned Additional Sessions Judge, therefore, in so far as it

deals with any money taken out of the possession of third person is wrong. And he should amend it accordingly, particularly in the case of the prostitutes Lachhan and Neni referred to at line 110 of the judgment and Rs. 100 paid to Amuli. Those persons and any other persons who may be in the same box are entitled to recover back their monies. But we will leave it to the Sessions Judge himself to pass that order because it is not very clear from the order of the learned Additional Sessions Judge from how many persons these sums were taken.

We, therefore, set aside the order of the learned Additional Sessions Judge and direct him to pass an order, according to law in the light of the above remarks.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 316 OF 1925.

May 8, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Mukerji.

LAHORI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 271—Penal Code (Act XLV of 1860), s. 302—Murder, charge of—Plea of guilty whether should be accepted—Trial—Procedure.

Murder is a mixed question of fact and law, and unless the Court is perfectly satisfied that a person on his trial on a charge of murder knew exactly what was necessarily implied by his plea of guilty, the case should be tried on evidence and the Court should come to a conclusion on the evidence as to the nature of the offence committed by the accused.

Dalli v. *Emperor*, 66 Ind. Cas. 427; 20 A. L. J. 326; 23 Cr. L. J. 283; (1922) A. I. R. (A.) 233, followed.

Criminal appeal from an order of the Sessions Judge, Meerut, dated the 31st March 1925.

Mr. *Ambika Prasad*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.—The only point that has been taken by Mr. Ambika Prasad, who appears on behalf of the appellant, is that the learned Sessions Judge accepted the plea of guilty and did not hear any evidence. He has called our attention to a case of *Dalli* v. *Emperor* (1). In the case Mr. Justice Ryves said: "After all murder is a mixed question of fact and law, and, unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried, and in dealing with people of the status of Dalli, this of course can never be the case". There are points of distinction which can readily be drawn between the case of this appellant and that of Dalli, because the appellant is undoubtedly a man of very considerable intelligence, and having beyond question killed this woman made a few hours later, on the same day, a perfectly clear statement about the facts, and later on the 9th of March, the day after the crime, gave to a Magistrate of the First Class the most clear and convincing account of the whole occurrence, and stated as a preliminary to it that he knew that he could be convicted on his own statement. When before the learned Sessions Judge he agreed that he had made the two statements, to which we have referred, and he pleaded guilty and said he killed the woman with the *chopper* produced, and the reason for killing her was jealousy. We think there was before the learned Sessions Judge enough material to make him perfectly confident as to the guilt of this man. Lahori accused did however state when pleading guilty that he killed her out of jealousy. He elaborates that in the petition of appeal to this Court, and it is that document which gives rise to the bare possibility that the accused may be able to put forward some ground for the application of s. 304 of the Indian Penal Code. Under these circumstances we are of opinion that the safer and better course would be to return this case to the Sessions Judge with a direction to him to put Lahori up for trial again, to take his plea, and whether that be guilty or not guilty, to hear the whole of the evidence in relation to the case. We, therefore, set aside the conviction and sentence and direct a re-trial.

Z. K. *Conviction set aside; Re-trial directed.*

(1) 66 Ind. Cas. 427; 20 A. L. J. 326; 23 Cr. L. J. 283; (1922) A. I. R. (A.) 233.

RANGOON HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION
No. 42 OF 1924.
December 2, 1924.
Present :—Mr. Justice Young.
NGA PO THA—ACCUSED–APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 526, 556—Transfer of case—Magistrate taking prominent part in Police investigation.

Where a Magistrate has taken more than a formal part in the Police investigation of a case he is disqualified from trying the case and if he proceeds to try it the case ought to be transferred from his Court to the Court of some other Magistrate.

King-Emperor v. *Maung Lat*, 2 L. B. R. 209, relied on.

Application for transfer of enquiry.

Mr. *Foucer*, for the Applicant.

Mr. *Gaunt*, Acting Government Advocate, for the Crown.

ORDER.—This is an application to transfer an enquiry into an alleged offence under s. 302, Indian Penal Code, from the District Magistrate, Pyapon, to the District Magistrate, Maubin, on the ground that the petitioner has reasonable ground to apprehend that the Magistrate is biased against him and is disqualified from conducting the said enquiry by reason that he has taken a prominent part in the Police investigation. The Magistrate himself records as follows in Criminal Miscellaneous No. 80 of 1924:—"I have read Violent Crime Report No. 343 of 1924 of Dedaye and have also seen the widow of the man stabbed and the persons accompaning the corpse. All these persons stated that the assailant was Po Tha Gyi (the petitioner). This man is a man of extensive property and is closely in touch with the leading desperadoes of Dedaye Town and I was awaiting return of another criminal case.....to deal with this position departmentally. In all the circumstances I think it advisable to hold investigation personally and take statements under s. 161, Cr. P. C."

Now in *King-Emperor* v. *Maung Lat* (1) it was held by Sir Thirkell White, C. J., (with him Briggs and Birks, JJ., concurred) thats. 556 of the Cr. P. C. actually disqualified a Magistrate—unless he had previously obtained the permission of the Court to which an appeal lay from his Court—from dealing as a Magistrate with any case in the Police investigation of which he had taken more than a formal part and they quashed the committal. *A fortiori* would such taking part in the Police investigation serve as a ground for transfer. Moreover I think the words "that he was in touch with the leading desperadoes of Dedaye Town" and the assertion that he was about to deal with the position shows distinct signs of bias and would deprive accused, in his opinion, of all hope of a discharge, though I need hardly say that I do not share his opinion; and finally, the Magistrate could hardly help using his personal knowledge of the statements made to the Police in their investigation which is forbidden under s. 162, Cr. P. C., and which he may not refer to, save at the request of the accused. For these reasons I allow the application for transfer and order the enquiry to be held by the District Magistrate, Maubin or such First Class Magistrate in his District as he may appoint.

Z. K. *Application allowed.*

(1) 2 L. B. R. 209.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 171 OF 1925.
May 29, 1925.
Present :—Mr. Simpson, A. J. C., and Mr. Gokaran Nath Misra, A. J. C.
SHEO NARAIN SINGH—ACCUSED—APPELLANT
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Evidence Act (I of 1872), ss. 114, ills. (b), 133—Accomplice—Corroboration—Several accused—Corroboration necessary about each accused—Dispensing with corroboration exceptional—Evidence, weight of—In weighing evidence Appeal Court must be guided mainly by Trial Court—Corroboration insufficient if evidence not of much weight.

An accomplice is unworthy of credit unless he is corroborated in material particulars. Where there are several accused, the corroboration must go to the guilt of each of the accused separately and it must be such as to satisfy the Court that the approver has not substituted the name of one or more of the accused for that of some other person who actually took part in committing the offence. [p. 262, col. 2; p. 263, col. 1.]

Queen-Empress v. *Ram Saran*, 8 A. 306 at p. 310; A. W. N. (1886) 311; 4 Ind. Dec. (N. S.) 1028, relied upon.

The rule with regard to corroboration of the statement of an accomplice is not an absolute one. But it is only in exceptional cases that the corroboration can be dispensed with. [p. 263, col. 1]

Queen-Empress v. *Gobardhan*, 9 A. 528; A. W. N. (1887) 156; 5 Ind. Dec. (N. S.) 790, relied upon.

As regards the credibility of oral evidence, a Court

of Appeal is mainly guided by the Court that heard that evidence. [p. 263, col. 2.]

A witness who does not carry much weight is not sufficient corroboration of an accomplice. [*ibid.*]

Appeal against an order of the Sessions Judge, Lucknow, dated the 21st March 1925.

Messrs. *R. F. Bahadurji* and *G. H. Thomas*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Nangu, Brahman, 35, Sheo Narain, Thakur, 30, and Moti Pasi, 20 were tried at one trial and were convicted under s. 302, Indian Penal Code, of murder. They were sentenced to be hanged by the neck until they are dead. All three have appealed and these sentences are also before us for confirmation.

Musammat Kailasha, the murdered woman, was a widow of about fifty years old. She was related to the approver Daulat Singh in this way that his father and her father-in-law were brothers. Daulat Singh has given a full account of the murder. He says that the principal motive was an affair, which took place several months before, when a Pasi girl named Rukminia was kidnapped by Nangu and Moti, in order that she might be sold in Lucknow by Kailasha. Sheo Narain and Daulat Singh were also in the plot. Kailasha took the gril away and it was believed that she obtained Rs. 300 for her but she distributed only Rs. 20 to her accomplices. There is corroboration with regard to this affair, because the disappearance of the girl was reported at the time by her own people, and they mentioned the name of Moti accused. There was also a recent incident in which Sheo Narain and Kailasha had quarrelled about a matter of Kailasha's kids trespassing and doing damage in Sheo Narain's house. Sheo Narain and Daulat Singh are cousins and they are equally related to *Musammat* Kailasha, and Sheo Narain lives next door to her. The incident of the quarrel is amply corroborated. There is a detail, which the learned Sessions Judge has considered important, namely, that Sheo Narain went and fetched his *lathi*, and called to Kailasha to come out in order that he might thrust it into her private parts.

The affair of Rukminia took place about the beginning of March 1924, long before the murder, which was committed on the night between the 18th and 19th December. The quarrel with Sheo Narain was seven or eight days before the murder. Daulat Singh describes how the four conspirators met at his house, and went from there to Kailasha's house, where Daulat Singh called on her to open the door. She did open it. They went in. Nangu threw Kailasha down on a bed. Moti took off her *dhoti* and wrapped it round her throat, and they strangled her so that she never uttered a cry. Sheo Narain, perhaps with some recollection of his threat, thrust a ladle into her private parts, but not in such a way as to do any injury. The murderers then took the jewels of the woman, and went to a banyan tree close to Kailasha's door. There Daulat Singh received two *mutkaras* as his share. At that point Baijnath Singh, P. W. No. 10, appeared and the four murderers dispersed to their houses. In the morning Daulat Singh went to Kailasha's house and saw her lying dead. He told his brother Mangal Singh that some one had killed Kailasha, and Mangal Singh made a report at the Police Station In this report he related the quarrel with Sheo Narain. The *Thanadar* reached the village about 1. P. M. on the 19th, and on the same day Daulat Singh gave him a list of the ornaments which Kailasha had been wearing. No doubt he did this in the capacity of her nearest relation. It was not until four days later, on the 23rd, that he made a confession. That came about through Gaili Singh. Gaili Singh keeps the sister of Kailasha as his mistress. She was naturally concerned about the murder of her sister, and she put her husband on to making enquiries from Daulat Singh Daulat Singh told the facts to Gaili Singh, probably believing that they would go no further, but Gaili Singh is also a *chaprasi* of the *Zilladar* Ram Sewak, so Ram Sewak got the facts from him, and told the *Thanadar*. Daulat Singh then confessed to the *Thanadar*, but he did not fully implicate himself until he had received a pardon.

The statement of Daulat Singh is full and detailed. It reads well, and which is much more to the point, it convinced the Court that listened to it. although it must not be forgotten that all four Assessors would have acquitted the appellants. But the case suffers from a fatal flaw. It is a well-known rule of Criminal Law that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The rule is formulated in these very words in s. 114, illustration (*b*), of the Evidence Act. The learned Sessions Judge is of course aware of the rule. He points out that the

production of the two *mutkaras* which Daulat Singh received at the time of the murder is corroboration of his statement, and he mentions the matter of the ladle thrust into the private parts.

Whether this could be regarded as sufficient corroboration of the main narrative, it is not necessary to decide, because the rule, that the evidence of an accomplice requires corroboration, has a second branch, which has been wholly omitted in this trial. That is that the corroboration must go to the guilt of each of the accused separately. It was said by Williams, J., and his *dictum* is quoted with approval in *Queen-Empress* v. *Ram Saran* (1) :—

"You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for at least knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatsoever."

Several other *dicta* to the same effect are quoted in that judgment. The rule is of undoubted authority both in India and in England, and has been affirmed repeatedly by all High Courts.

Now what is the corroboration in the present case? It must be such as to satisfy the Court that Daulat Singh has not substituted the name of one or more of the appellants for that of some other person, possibly a particular friend of his own, who actually took part in the murder. It is on that basis that the rule rests, and, if we may say so with respect, we ourselves regard it as a very sound rule. The rule is not absolute [see Evidence Act, s. 114, "as to illustration (*b*)"]. See Evidence Act, s. 133. See also *Queen-Empress* v. *Gobardhan* (2). But it is only in exceptional cases that the corroboration can be dispensed with. There is nothing exceptional in the case before us. We have, therefore, gone through the evidence very carefully in order to find corroboration of this kind. We have found two witnesses, and two only, whose evidence amounts to corroboration against the individual accused. One of these is Baijnath Singh, P. W. No. 10. He states that his house is about one hundred yards from that of Kailasha, and that one night he was going to Hubba's house to get a bullock for his cart when he saw, under a banyan tree near Kailasha's door Daulat Singh, Sheo Narain, Moti and Nangu. It was a moonlight night. They were about ten paces away. He was not cross-examined on the question of his recognition of them. They all ran away. The witness finished his business and went home. He went home in his cart, and when he got back to the village in the evening he heard of the murder. This fixes the day as the same day. It will be remembered that this man was mentioned in Daulat Singh's statement. That was how the Police got his evidence. The question would arise whether this evidence is weakened by the facts that it was withheld for five days after the *Thanadar* arrived in the village. But this is not the Court of Trial. We must be guided as regards the credibility of oral evidence mainly by the Court that heard it. Evidently Baijnath Singh made no impression on the Court. His evidence is referred to in these words :—

"The witness is, of course, an accidental one, and does not carry much weight."

A witness who does not carry very much weight is not sufficient corroboration of an accomplice.

There is one other witness. That is Debi, D. W. No. 11. He deposes that his house is 25 paces from Daulat Singh's and that two *gharis* after nightfall he saw Nangu and Moti go to Daulat's house. Next day he heard that Kailasha had been murdered. If this statement is accepted as true, it does not carry us very far. It brings Nangu and Moti to Daulat Singh's house early in the evening. It does not follow that they remained there till midnight, and then went to Kailasha's house and committed the murder. There is absolutely no other corroboration with regard to the individual accused.

None of the convictions can, therefore, stand. We accept the appeals of Sheo Narain, Nangu and Moti. We set aside the convictions and sentences, acquit all three appellants and direct that they be set at liberty.

S. D. *Appeal allowed.*

(1) 8 A. 306 at p. 310; A. W. N. (1885) 311; 4 Ind. Dec (N. S) 1028.

(2) 9 A. 928; A. W. N. (1887) 156; 5 Ind. Dec. (N. S.) 790.

ALLAHABAD HIGH COURT.

CRIMNAL APPEAL No. 190 OF 1925.

March 25, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir Theodore Caro Piggott.

HAR SARUP AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 96, 300, Excep. II, 302, 304—Fatal wound inflicted during fight—Offence—Murder—Culpable homicide not amounting to murder.

A savage enmity had been growing up for some time between the two accused and the deceased and his brother who were their next door neighbours. On a certain evening acts of aggression had been committed on both sides and after challenges to come out and fight had passed from one house to the other an encounter took place in front of the two houses in the course of which injuries were inflicted and suffered on both sides. At some stage of this encounter one of the accused ran into the ante-room of his own house and was followed there by the deceased who was armed with a *lathi*. A sharp struggle then occurred just inside the entrance door and in the course of that struggle the former, with his spear, inflicted upon the deceased a wound of which the deceased expired almost immediately:

Held, that the act of the accused was not completely covered by the provisions of law relating to the right of private defence, but that it fell within the second Exception to s. 300 of the Penal Code and that he was, therefore, guilty of an offence under s. 304 of the Code. [p. 268, col. 2.]

Criminal appeal against an order of the Additional Sessions Judge, Moradabad.

Mr *M. M. Raina*, for the Accused.

The Government Pleader, for Government Advocate, for the Crown.

JUDGMENT.—Two brothers, Har Sarup and Harbans Lal, Kayasthas by caste, the former aged about 29 years and the latter his senior by 26 years, have been tried and convicted by the Sessions Court of Bijnor, on a charge under s. 302 of the Indian Penal Code, alleging against them the wilful murder of their caste-fellow and neighbour Sham Lal. The record is before us for confirmation of the sentence of death passed by the Sessions Court. Both accused have submitted petitions of appeal, and the case has been argued by Counsel on their behalf. The petitions of appeal follow the lines of the defence set up in the Sessions Court, though the accused were certainly most unwise to have reserved that defence for the Court of Sessions and not to have preferred it in full detail when they had an opportunity of doing so before the Committing Magistrate. Up to a certain point the facts are scarcely in dispute. The two appellants lived in a house adjoining that of Sham Lal; in fact it would seem that the two had at some time formed parts of one and the same house. Sham Lal had a brother Piare Lal, who, more or less, lived with him though for reasons which we need not go into, he was not in the habit of sleeping at the house. Piare Lal was unmarried, and Sham Lal does not so far as the evidence goes, appear to have ever had a lawfully married wife. He did, however, keep a concubine, who bore him a daughter of the name of Bhaggu. This little girl, aged about 13, is unquestionably the main cause of the tragedy which had occurred. We think there can be no doubt on the evidence that Har Sarup wanted this girl for himself, though whether he seriously believed that he could contract a lawful marriage with her, which would be recognized by his brotherhood, or merely desired to keep her as his concubine, it is impossible to say. There was very bad blood between the parties, probably in consequence of the offers which the accused were making for the person of this girl. According to the evidence, each of the parties had resorted to the irritating system of petty annoyance involved in throwing brick from one house into the other, or the shouting of filthy abuse from outside. The death of Sham Lal occurred somewhere about 9 P. M. on the 28th of September last. On the afternoon of the previous day the appellant Harbans Lal had made an elaborate report at the Police Station, in which he complained that Sham Lal and his brother Piare Lal were annoying and abusing him, that they were bringing pressure to bear upon him to vacate the house in which he was living and that he was in fear of his life at their hands. Soon after 9 P. M. on September 28th, Piare Lal was at the Police Station, reporting the murder of his brother Sham Lal by the two appellants. Sub-Inspector, Ram Ratan Lal, proceeded at once to the spot. He found the two appellants inside their house, behind locked doors, which they refused to open at his summons. Their own clothes were stained with blood as also was the clothing of their old mother. In a corner of the entrance-room leaning against the wall, were an axe and a spear, both of them stained with blood. Sham Lal had been carried into his own house.

He was quite dead. The medical evidence shows that he had received a thrust with some such weapon as the spear recovered from the possession of the appellants on the right side of his chest, which had penetrated into the lung. There were also two incised wounds, not of a very serious character, on the head and a contused wound on the shoulder. A youth of the name of Bhukan, who is a witness for the prosecution in the case, was found to have an incised wound on the left arm and a trifling cut on his right little finger. On the other hand, both the appellants showed marks of injury on their persons, though by no means serious ones. Har Sarup had received a slight cut on one of his fingers, the palm of his right hand was bruised, and he had a curious mark in the neighbourhood of the left shoulder which the medicial officer thinks might very possibly represent a tooth bite. Harbans Lal had a bruise on the back of the neck such as might well have been inflicted by the blow of a *lathi*. When the case came into Court, the prosecution called Piare Lal himself and the little girl Bhaggu; also this youth Bhukan, whom we have spoken of as showing the mark of a slight wound. They also called Bhagwan Chander *alias* Pisu, the own brother of the said Bhukan; another Brahman of the name of Chajju Mal, and a Muhammadan shop-keeper named Nasir ud-din. The last named was disabled by illness at the time of the sessions trial, and the learned Sessions Judge has very properly brought on to the record the statement which this man had made to the Magistrate. One of the most remarkable features of the case has been entirely ignored by the learned Sessions Judge. Piare Lal's report at the Police Station is quite an elaborate document. It is the work of an intelligent man, well accustomed to describing events in narrative form. It tells in detail the story of Sham Lal's murder and of the circumstances alleged to have led up to the same. It asserts the presence of the deponent himself and of Bhukan on the scene of the crime, and may be said to imply, or at any rate, to account for, the presence of the girl Bhaggu. The noticeable point, however, is that the report goes on to give the names of four persons as being those who first arrived on the scene when an outcry was raised. Two of these persons have not been produced in evidence at all; the names of the other two are Baldeo Kishan and Ganga Sahai. The Sub-Inspector of Police says that he recorded statements made by these two persons in the course of the night following the commission of the crime. They themselves deny this; but Baldeo Kishan admits making a statement to the Police at 11 A. M. on the 29th of September, and Ganga Sahai practically admits having done the same, either on the 29th or on the 30th of September. The Sub Inspector contents himself with remarking that he did not send up these two men as prosecution witnesses because he had heard that they would not be willing to give evidence. They actually appeared at the Sessions trial as witnesses for the defence; so they were willing enough to give evidence. What the Sub-Inspector means is that they were not prepared to bear out the story put forward by Piare Lal and the witnesses who supported him. What we have to do is to consider and to appraise the evidence of Piare Lal, Bhaggu, Bhukan and the two apparently extraneous witnesses whom the Police did succeed in producing as against the evidence of Baldeo Kishan and Ganga Sahai, who, on Piare Lal's own admission, were amongst the very first persons to arrive on the scene of the disturbance. It will now be expedient to indicate in brief outline the nature of the prosecution story, and what the accused and their witnesses say in reply. Piare Lal says that he and his family were being subjected to a sort of prosecution in the matter of this little girl Bhaggu; stones were being thrown into their house and threatening letters left at their door. On the night in question both he himself and Sham Lal had been invited to a feast at a neighbour's, though, as a matter of fact, they went there independently and at different times. He himself was making his way towards the house to which he had been invited when he heard a disturbance from the neighbourhood of his own house. He happened at the time to be close to the shop kept by Bhukan and his brother Pisu. He hurried in the direction of his house being followed, first by Bhukan and after some interval by the latter's brother. He reached the open space in front of the two houses of the parties. On to this there open the doors of

a room, described as the *tidari* belonging to Sham Lal's house, and also a single door leading into a narrow entrance-room, described as the *dahliz* of the house of the appellants. Piare Lal's story is that as he arrived on the scene the two appellants were attacking Sham Lal, one of them with a spear and another with an exe. He flung himself into the fray, avoided a blow aimed at him by Harbans Lal, and grappling with the latter flung him to the ground. In the meantime two women, the mother and the sister of Harbans Lal, emerged from their house and began dragging Sham Lal into the *dahliz*. The man was alrerdy wounded and fell down as the women began dragging him. Bhukan interfered and succeeded in grasping Sham Lal's feet at the moment when about half the man's body had been dragged over the threshold of the *dahliz*. Then Bhakan himself was wounded with a spear thrust from Har Sarup, while Harbans Lal broke loose from the witness and struck Sham Lal another axe-blow. Then the accused and their women folk took refuge inside their house, and Piare Lal and the witnesses with him were able to carry Sham Lal's corpse, the man having by that time expired, first into the open space outside and afterwards into his own house. This is the story told in substance also by the girl Bhaggu and by the prosecution witnesses, Bhagwan Chander and Nasir-ud-din. The witness Chhajiu Mal deposes only to the search of the accused's house and the recovery of blood-stained clothing and weapons from them. It would be quite possible to criticise this evidence in matters of detail, but there are certain general considerations against its credibility. Bhagwan Chander and Nasir-ud-din, as we have already noticed, were not mentioned in the First Report, and in the case of Nasir-ud-din we are deprivad of the advantage of considering any cross-examination to which he might have been subjected at the Sessions trial. Their evidence reads to us somewhat artificial, and we find it practically impossibe to avoid believing that they came on the scene too late to see much of what they have described. Moreover, their evidence, as well as the entire story told by Piare Lal, pre-supposes a struggle of such duration that it is difficult to believe that at the end of it Sham Lal would have shown only the four marks of injury on his person observed at the *post mortem*. The other difficulty about this evidence lies in the fact that the Sub-Inspector found two very definite pools of blood, one in the open space outside the two houses and the other inside the *dahliz* of the accused's house. He was not examined as carefully as he ought to have been with reference to this very important statement. He did, however, produce and prove a certain plan of the locality, and we are entitled on the strength of his evidence to take notice of marks placed upon the said plan and explanatory notes made concerning those marks. Now, the pool of blood inside the *dahliz* was not in the doorway; it was not far from the doorway, but it is shown in the plan distinctly to one side of the same. This is significant when we come to consider the defence of the accused and the statements of their witnesses. We have already remarked that the accused elected to reserve their defence. Even in their statements before the Sessions Court we find the sort of hesitation and confusion which is to be expected in the statements of persons on their trial on a capital charge, who are not really prepared to make a clean breast of the facts as known to them, but who are anxiously thinking how they can best tell an apparently co herent story which will not involve any direct admission against themselves. Any one reading Har Sarup's statement as it stands on the record cannot fail to realize that the man knows perfectly well that he stabbed Sham Lal in the chest with a spear and thereby caused his death. He will not actually say this; but in reply to the questions put to him he returns answers which practically amount to the same thing. He tells a queer story as to the grounds of enmity between himself and his next-door neighbours, and he says that on the night in question it was the said neighbours who were abusing him and his brother throwing bricks into their house, and challenging them to come out and fight. The accused were safe indoors with the door shut, and we know that they had inside the house the weapons which the Police afterwards found there. Har Sarup, however, wishes the Court to believe that he and his brother grew so alarmed at the thought that Piare Lal and Sham Lal and their friend Bhukan might climb over into their house that

they began to shout for help. On this, he says, his witnesses, Baldeo Kishan and Ganga Sahai came on the scene, and on the arrival of the witnesses he and his brother opened the house-door and came out. As soon as they had done so, they were set upon by Piare Lal and Sham Lal and Bhukan with *lathis*. While a scuffle was going on outside between Piare Lal and Harbans Lal, in which the two witnesses were vainly attempting to interpose, Har Sarup himself ran into the house, being pursued by Sham Lal and Bhukan. Inside his own *dahliz* he turned to bay, and, as he puts it, "I struck one spear blow to save myself, I do not know whether it hit Sham Lal or not." In substance this story is also told by Harbans Lal, and in the main it is corroborated by Baldeo Kishan and Ganga Sahai. The learned Sessions Judge has been very severe on Baldeo Kishan by reason of certain admissions which this witness made in respect of a statement not otherwise proved, which he was said to have made to a Vakil of the name of Brij Nandan Saran, who came on the scene in the course of the night between the 28th and the 29th of September. It seems to us that this statement ought either to have been put frankly in evidence, or that all reference to it ought to have been omitted As the record stands, we have an admission by Baldeo Kishan that he did make a statement to the Vakil, and one or two fragmentary questions are put as to whether he had not said to the Vakil this one thing or that other thing. It is quite easy to create a totally misleading impression as to the veracity of a witness by cross-examining him on these lines. Another point severely commented on by the learned Sessions Judge is that neither of these two witnesses hastend to give the Investigating Police Officer the benefit of their evidence the moment he arrived on the scene. If this sort of criterion is to be applied to evidence in this country, there will be very few eye-witnesses to important crimes who will be found entitled to credit, whether they eventually appear as witnesses for the prosecution or as witnesses for the defence. On the whole we are inclined to agree with the learned Sessions Judge that Baldeo Kishan and Ganga Sahai display in their evidence a certain leaning towards the accused persons and a desire to represent their actions in as favourable a light as possible. At the same time it does not seem to us easy to give any definite reason why they should be regarded as less worthy of credit than the prosecution witnesses, and their story, as a whole has the advantage of accounting for the pool of blood found just inside the *dahliz*. There is one more curious, and, indeed sensational, feature of this case. Piare Lal had asserted in his First Report that he and his brother had been subjected to prosecution by means of threatening letters. He handed over to the Police three letters which he said had been given him by the little girl Bhaggu; and Bhaggu's account of the matter is that she found these letters lying in the doorway of their houses on the morning after the murder. These letters have been most carefully translated on our record, and they have apparently been treated in the Court below as corroboration of the case against the accused. Their only effect on our minds is to introduce a serious element of uncertainty into the whole matter. They are curiously worded letters, ostensibly addressed in very polite terms to the "dear sister" of the writer. The suggestion is that they are meant for the aged mother of Piare Lal and Sham Lal. They do contain demands for the hand of the girl Bhaggu, and they are accompanied by threats against the life of the person addressed and the lives of everybody connected with her. In two of these letters the writers are very careful to assert that they are going about prepared for murder, armed with a spear and a hatchet, the very weapons with which Sham Lal was eventually killed. The absurdity of supposing that letters threatening the life of a member of the household would continue to be written and delivered after the murder was an accomplished fact does not seem to have presented itself to the mind of the learned Sessions Judge. Some other explanation of the production of these letters before the Investigating Police Officer must be sought. We could suggest more than one, but it is useless to indulge in mere speculations. When, however, the Police came to examine the clothing of the murdered man, they found on Sham Lal's person, saturated with blood, what they thought to be two letters, which have been assumed to belong to the same series. The letters were

marked Exs. G and H. They were certainly never translated for the benefit of the Court, and, so far as we can discover, no attempt was ever made to read them until we insisted on having them opened out at the hearing of the appeal. We at once discovered that there were in reality three letters, and not two : two of them were gummed together by the dried blood. It was exceedingly difficult to decipher these papers now, but we managed to obtain a fair general idea of the contents of one of them. It is a letter similar in style to the three Ex. D, E and F. and it does contain an explicit threat against the life of Piare Lal. Needless to say, it contains no reference to an axe or a spear. We are bound to add also that, although both the appellants are literate and occupy positions which must have made it the easiest thing in the world to secure specimens of their hand-writing, no attempt was made to produce evidence regarding the handwriting of Exs. D, E and F much less of Exs. G and H, which, as we have said, were not read at all in the Court below. On the whole, we prefer to draw no certain inferece from these letters, except that we are inclined to believe the statement made by Piare Lal in his First Report as well as in his evidence that letters of a threatening character connected with demands for the hand of the girl Bhaggu had been received during the days immediately preceding the murder.

Coming now to sum up the entire case, the conclusion at which we arrive is that the prosecution evidence, more particularly where it puts forward allegations which, if believed, would make the crime of both the appellants unquestionably nothing short of murder is not to be implicitly relied on. We regard it as in itself open to criticism, and it is to a considerable extent outweighed by the defence evidence and by the Sub Inspector's plan of the locality. We are satisfied that a savage enmity had been growing up for some time between the two appellants and the two brothers Sham Lal and Piare Lal who were their next door neighbours. We believe that acts of aggression had been committed on both sides on the evening in question. We are not prepared on the evidence to believe that anything more than this is proved, namely, that after challenges to come out and fight had passed from one house to the other, there an encounter in the open space in front of the two houses, in the course of which injuries were inflicted and suffered on both sides. At some stage of this encounter Har Sarup ran into the *dahliz* of his own house and was followed there by Sham Lal and Bhukan. A sharp struggle then occurred just inside the entrance door of the *dahliz* and in the course of that struggle Har Sarup with his spear injured Bhukan and inflicted upon Sham Lal the fatal wound of which the unfortunate man expired almost immediately. This being our conclusion on the case, we think that the conviction under s. 302, Indian Penal Code, ought not to be affirmed. The case is somewhere on the borderland of the second and fourth Exceptions to s. 300 of the Indian Penal Code. We should unhesitatingly apply Exception 4, if it were not that we believe on the evidence that Har Sarup was using a spear against a man who was only armed with a *lathi*. On the other hand, we must give him the benefit of our belief that he was within the threshold of his own house when he inflicted the fatal injury and though we are by no means prepared to hold that his act is completely covered by the provisions of the law relating to the right of private defence, we think that Exception 2 above referrred to sufficiently covers the case to warrant our altering the conviction to one under s. 304, Indian Penal Code. As regards Harbans Lal, we are not prepared to separate his case from that of his brother, except in the matter of sentence. The injuries found on the head of the deceased, although the medical expert was not asked for a definite opinion on the point, are pretty obviously such as would have resulted from blows of an axe or hatchet, and with this corroboration we are prepared to accept the prosecution evidence which proves that Harbans struck at least one, if not two, such blows. Accordingly, we set aside the conviction and the sentence recorded by the Sessions Court. In lieu thereof we convict Har Sarup and Harbans Lal of the offence of culpable homicide not amounting to murder under s. 304, Indian Penal Code. We sentence Har Sarup to undergo rigorous imprisonment for ten years and Harbans Lal for six years.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 311 OF 1925.

July 14, 1925.

Present:—Mr. Simpson, A. J. C.

DILLI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 141 (4), 147—Religious procession, right to take, through streets—Intention to fight—Unlawful assembly—Riot.

Persons of whatever sect are entitled to conduct religious processions through public streets provided they do not interfere with the ordinary use of such streets by the public and subject to such directions as a Magistrate may lawfully give to prevent obstructions of thoroughfares or breaches of the public peace. [p. 269, col. 2.]

The mere knowledge that a religious procession is going to be opposed by force is not in all cases sufficient to constitute the members of the procession an unlawful assembly. Each case must be decided on its own facts. [p. 270, col. 2.]

Where, however, the members of a procession go out armed for the express purpose of having a fight and a fight ensues as a consequence, the members of the procession are guilty of rioting. [*ibid.*]

Case-law referred to.

Appeal against an order of the Additional Sessions Judge, Kheri, dated the 9th May 1925.

Mr. *R. F. Bahadurji*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—Twenty-seven persons all Hindus were tried at one trial and were convicted under s. 147 of riot. Six of them were sentenced to six months' rigorous imprisonment and 21 to three months' rigorous imprisonment. All 27 have appealed. There was a cross case against 14 Muhammadans. They were all convicted under s. 147. Ten of them appealed and their appeals have been rejected by a separate judgment. In the Court of Trial the learned Sessions Judge tried the case separately but he wrote only one judgment. It would have been more convenient if he had written two judgments.

The story for the prosecution is the Muhammadan version of what occurred. It is that the Hindus wanted to have a procession for the *barat* of Mahadeo Ji and to take this procession through the Muhammadan quarter of Sikandrabad. As this was a new thing, the Muhammadans objected to it and negotiations took place. No agreement was reached. The Hindus took their procession into the Muhammadan quarter where they proceeded to attack Raza Khan in his own house and his mother. The Mohammadans came out to protect these people and a fight took place.

The defence story was the Hindu version of what took place. It was that some 10 days before the riot the people of Mahawatpur, who were Musalmans, proposed taking their *tazias* through the village of Sikandrabad. The Hindus of Sikandrabad objected and applied to the authorities to issue orders that the *tazias* should be buried in Mahawatpur itself. This was some 10 days before the riot when the Hindus wanted to take their *barat* procession through the Muhammadan quarter. Negotiations took place and the Mohammadan leaders agreed that 7 or 8 Hindus only should bring the *singhasan* from the temple through the Muhammadan quarter and that the big procession should then be formed outside the Muhammadan quarter. In this matter however the Muhammadan leaders were treacherous, and, having got the 7 or 8 unarmed Hindus into the middle of the Muhammadan quarter, they called on the inhabitants to attack them, and it was then that the riot took place. The learned Sessions Judge has not believed either of the stories. He has come to the conclusion that the Hindus tried to take their procession, in full force and armed with *lathis*, through the Muhammadan quarter, and that the Muhammadans were resolved to prevent them and bar the way, and so the riot took place. I accept these findings of fact, and, indeed, Counsel for the appellants did not address his argument as to the question of fact. What he said was that on these findings his clients had not broken the law. They were entitled to take a procession through the streets. Such a right does exist. That was decided as recently as 13th November 1924 by the Privy Council in the case *Manzur Hassan* v. *Muhammad Zaman* (1). In that case the *dictum* of Turner, C. J. in the case of *Parthasaradi Ayyangar* v. *Chinnakrishna Ayyangar* (2) was quoted with approval:

"Persons of whatever sect are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace."

(1) 86 Ind. Cas. 236: 2 O. W. N. 53; (1925) A. I. R. (P. C.) 36; 48 M. L. J. 23; 21 L. W. 239; 6 P. L. T. 115; 23 A. L. J. 179; 27 Bom. L. R. 170; L. R. 6 A. (P. C.) 34; 29 C. W. N. 486; 47 A. 151 (P. C.).

(2) 5 M. 304; 2 Ind. Dec. (N. S.) 211.

It is contended, however, for the prosecution, and this is the view which was taken by the learned Sessions Judge that an assembly which proposes to take out a procession is unlawful if the members of the assembly know that there is another party which is bent on opposing them. Their action then comes under s. 141, cl. (4) "enforcing a right by means of criminal force."

The question is not one of fact but one of law. In the case *Beaty* v. *Gillbanks* (3) the facts were that the Salvation Army proposed to parade the streets with a band, flags and banners in a religious procession. A party who were opposed to Salvation Army proposed to obstruct this procession. Two Justices of the Peace issued orders to prevent persons assembling in the public streets within the parish and the leader of the Salvation Army Beaty was served with this notice. Nevertheless he took out the procession, and when the Police told him that he must obey the notice, he refused to comply and marched on until he was arrested. The members of the Salvation Army used no violence, but the other party did use violence, and there was a fight between the other party and the Police. On these facts it was held that the members of the Salvation Army were not an unlawful assembly because all that they wanted to do was to conduct religious procession. It was said "What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the Justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act."

The Criminal Law of England is not identical with the Penal Code. I think the appellant Beaty would at least have been guilty under s. 188, Indian Penal Code, and that fact would probably have been sufficient to constitute the Salvation Army procession an unlawful assembly. But in the present case there had been no order by one in authority prohibiting the Hindu procession. On the other hand, in the English case, the members of the Salvation Army used no violence themselves, and had no intention of using violence. I find, as a matter of fact, that the object of the Hindus was not so much to conduct a religious procession, as to have a fight with the Muhammadans and they took *lathis* with them for this purpose. That is how I interpret the charge-sheet under which they were accused of taking out their procession by force.

I am not prepared to hold that the mere knowledge that a religious procession was going to be opposed by force is in all cases sufficient to constitute the members of the procession an unlawful assembly. Each case must be decided on its own facts. Here, as I have said, I believe that the Hindus went out for the express purpose of having a fight and they have been rightly convicted. No argument was addressed to me as regards any particular appellant, and the grounds of appeal are not separate. It is enough to say that there is evidence that each of the appellants took part in the riot, and this evidence was accepted by the Court of Trial, namely, the Judge and three out of four of the Assessors, in spite of the fact that all these four Assessors are themselves Hindus.

I dismiss all the appeals.

Z. K. *Appeal dismissed.*

(3) (1882) 9 Q. B. D. 308; 51 L. J. M. C. 11; 47 L. T. 194; 31 W. R. 275; 15 Cox C. C. 138; 46 J. P. 789.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 657 OF 1924.
February 6, 1925.
Present :—Mr. Justice Fforde.
BENARSI DAS—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439—Criminal trial—Remarks made in judgment against person who is not party to proceedings, legality of—Evidence, admissibility of—Duty of Magistrate—Revision—Interference by High Court.

It is an elementary duty of a Judge in a criminal case to exclude evidence which is not legally admissible. [p. 272, col. 1.]

A Magistrate is not entitled to make observations in his judgment in a criminal case concerning a person who is not a party to the proceedings and who has had no opportunity of being heard, based upon material which is not admissible in evidence in that proceeding and which even if admissible would not justify the observations. Such conduct on the part of a Magistrate amounts to an abuse of judicial privilege. Where such reflections are made on the character of a person who is no party to the proceedings and who has not appeared as a witness, they cannot be allowed to stand on the record and must be expunged therefrom. [*ibid.*]

Application in revision to have certain portions of the judgment of the Magistrate, First Class, Ambala, dated the 18th February 1924, upheld by the Sessions Judge, Ambala, dated the 21st March 1924, expunged,

Mr. *Jagan Nath*, for the Petitioner.

Mr. *Badri Das*, for the Accused.

JUDGMENT.—This is an application on behalf of Rai Bahadur Lala Benarsi Das for an order that certain remarks contained in the judgment of Chaudhri Sardar Khan, a Magistrate invested with First Class powers, delivered in a criminal case, be expunged.

The facts giving rise to this petition are shortly as follows:—Pandit Shugan Chand, Head Clerk of the Cantonment Magistrate's Office, Ambala was prosecuted at the instance of Pandit Ram Kishan under the provisions of s. 168 of the Indian Penal Code. The section runs as follows:—"Whoever, being a public servant, and being legally bound, as such public servant, not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both." It was contended by the prosecution that Pandit Shugan Chand was a public servant, was legally bound as such public servant not to engage in trade and did in fact engage in trade. The learned Magistrate, who tried the case, came to the conclusion that the accused had not been proved guilty of any offence. He considered that, though the Head Clerk in the Cantonment Magistrate's Office was a public servant within the statutory definition of that term, he was not legally bound as such public servant not to engage in trade, and he further held that there was no definite proof that he had in fact engaged in trade, and upon these findings the accused was acquitted.

Not content with deciding the issues which properly arose out of the charge which he had to try, the learned Magistrate proceeded in the concluding portion of his judgment to express strong opinions as to the motives which he considered had inspired the prosecution. He declared that the accused was the victim of a conspiracy on the part of the Managing Committee of the All-India Cantonment Associction. He stated that this body, of which the petitioner is the Vice-President, was anxious to have the accused dismissed from his post simply because its members had failed to have their own way with the Cantonment Authorities. He further added that the columns of a newspaper known as the *Cantonment Advocate* had been freely used by the petitioner and those associated with him to injure the accused. He concluded his judgment by stating that "the complaint is based purely on malicious prosecution of the accused." These are the portions of the judgment which the petitioner asks to have expunged. An application for this purpose was made to the Sessions Judge of Ambala but was rejected.

The learned Sessions Judge in the course of his judgment says: "Ordinarily I would be strongly disposed to forward the proceedings to the High Court with a recommendation that these remarks against a person who was neither a party nor a witness should be expunged." He then goes on to say that the article in the *Cantonment Advocate* afforded justification for the adverse comments of the Magistrate, and that it was essential in order to enable the Magistrate to properly weigh the prosecution evidence to ascertain how far the allegations of the accused against certain members of the association were justified. He further says that the petitioner by putting at the disposal of his association some of his private correspondence has himself invited criticism of his actions, and he concludes by stating "that there is sufficient evidence on the record to justify the Magistrate in making the remarks which form the complaint of the present application."

It is urged by Mr. Jagan Nath, who appears for the petitioner, that as his client was neither a witness in, nor a party to, the proceedings in question, the Court had no right to come to these conclusions—highly prejudicial, as they are to his character, amounting as they do to a charge of serious misconduct if not of criminal conspircy—without the petitioner having had an opportunity of being heard in his defence. Mr. Jagan Nath further contends that the material upon which the strictures against the petitioner have been based is not legal evidence in the case and should not have been admitted. He also contends that even if such material could legally be admitted in evidence it does not justify the conclusions based upon it.

The principal material relied upon by the Magistrate for passing these strictures upon the petitioner consists of three letters written to the petitioner by the Cantonment Magistrate. These letters deal almost exclusively with the writer's own affairs, though in two of them a passing reference is made to the Head Clerk, Shugan Chand,

It is obvious to any one with the most rudimentary knowledge of the Law of Evidence that these letters could not be made evidence by the prosecution. The writer has not been called as a witness, and under no circumstancss could his letters be evidence in the proceedings against Shugan Chand. It was the duty of the Trial Magistrate to refuse to admit these documents, but instead of doing so he has used them for the purpose of making an attack upon the recipient of the letters which is not warranted by anything contained in them. Similarly, the newspaper which has been admitted to the record, is not evidence and should have been excluded by the Magistrate.

I can find no legal evidence upon the record warranting any of the strictures passed by the Magistrate upon the petitioner, and even if the documents upon which the Magistrate has relied for passing the strictures had been properly admitted in evidence, he had no right to express himself as he did without giving the petitioner an opportunity to be heard in his defence. I may point out that it is an elementary duty of a Judge in a criminal case to exclude evidence which is not legally admissible. The Trial Magistrate in the case before me has conspicuously failed in this duty. I am further of opinion that the observations of the Magistrate concerning the petitioner, made in a proceeding in which the petitioner had no opportunity of being heard, based upon material which is not admissible in evidence in those proceedings and which, even if admissible, would not justify the observations in question, amount to an abuse of judicial privilege. In view of the fact that the Magistrate was aware that a suit by Shugan Chand for damages for malicious prosecution was pending, or was intended to be instituted, there was an additional duty cast upon him in the interests of justice that he should say nothing which might prejudice a fair trial of the suit.

For the reasons I have given, I am of opinion that it would be a denial of justice to allow the reflection upon the character of the petitioner to stand, and I accordingly direct that the portion of the judgment commencing with the words "A perusal of the allegation in the *Cantonment Advocate* down to the end of the judgment be expunged," with the exception of the words. "Upon these facts I hold that no case under s. 168, Indian Penal Code, has been made out against the accused whom I acquit," and the words, "I do not think he can be ordered to pay compensation under s. 250, Cr. P. C." The accused is present. Ram Kishan has not turned up. Announced.

Z. K. *Revision accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1730 OF 1924.

March 13, 1925.

Present:—Justice Sir Henry Scott-Smith, KT.

FAIZ MUHAMMAD—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 436—Discharge, order of—Further enquiry, when can be directed.

Further enquiry should not be ordered in a case where an order of discharge has been passed after a full enquiry and after the recording of all the evidence produced by the complainant.

Nasir-ud-din v. *Abdul Aziz*, 33 Ind. Cas. 641; 20 P. W. R. Cr. 1916; 17 Cr. L. J. 161, followed.

Criminal revision from an order of the District Magistrate, Karnal, dated the 22nd November 1924.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Muhammad Rafi*, for the Crown.

Mr. *H. D. Bhalla*, for the Complainant.

JUDGMENT.—The District Magistrate has set aside the Magistrate's order discharging Faiz Muhammad in a case under s. 498, Indian Penal Code, on the ground that it is perverse. The order was passed after a full enquiry and the recording of all the evidence produced by the complainant Atra. There was no evidence of the actual abduction which was alleged to have taken place two months before the complaint was filed on 14th June 1924. The only evidence, except that of Asa Ram, P. W. No. 6, which related to an event subsequent to the filing of the complaint, was in regard to Faiz Muhammmad having been caught committing adultery with Atra's wife in an old school on 11th June. This has been disbelieved by the Magistrate for what I consider are sound reasons. Having regard to the authorities including the case reported as *Nasir-ud-din* v. *Abdul Aziz* (1) I hold that the District Magistrate's order setting aside the order of discharge was erroneous. I allow the revision and set aside the order in question.

Z. K. *Revision allowed.*

(1) 33 Ind. Cas. 641; 20 P. W. R. Cr. 1916; 17 Cr. L. J. 161.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 125-B OF 1923.

April 14, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

ONKARPRASAD M. G. NANDLAL—DEFENDANT No. 2—APPELLANT

versus

BADRIDAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Lease—Place for payment of rent not fixed—Oral agreement fixing place of payment, whether can be proved—Transfer of Property Act (IV of 1882), s. 108—Lease—Covenant for renewal—Assignment of lease—Assignee, whether can enforce covenant—Renewal dependent on observance of conditions—Breach, condoned, effect of—Assignee of lessor's interest, whether bound by covenant.

In the absence of any stipulation in a lease-deed fixing the place of payment of rent, it is open to one of the parties to the deed to show, without contravening the provisions of s. 92 of the Evidence Act, that it was subsequently agreed orally between the parties that the rent was to be paid at a particular place. [p. 274, col. 1.]

Where a lease contains a condition that renewal of the lease would be dependent upon the performance of certain covenants during the term of the lease, that condition is deemed to have been satisfied if there is no subsisting breach at the time renewal is applied for although there may have been breaches of covenants during the term of the lease. [p. 274, col. 2; p. 275, col. 1.]

A covenant for renewal of a lease of land being a covenant running with the land, the assignee of the lessee is competent to enforce the covenant; and the covenant may be enforced against a transferee of the lessor's interest who takes with notice of the lease. [p. 275, col. 1.]

Case-law discussed.

Appeal against the judgment of the Additional District Judge, Akola, dated the 22nd December 1922, in Civil Appeal No. 25 of 1922.

Sir Dr. *H. S. Gour* and Mr. *P. C. Dutt*, for the Appellant.

Messrs. *V. Bose*, *A. V. Khare*, *W. B. Pendharkar* and *P. N. Rudra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract for renewal of a lease given by Laxmichand Jainarayan to the Hingoli Press Compay Limited. The lease was in respect of a piece of land situated in the town of Akola and was to run for 30 years from 11th November, 1887. A deed of lease was actually executed by the lessor in favour of the lessee on 19th July, 1892 (Ex. P-1). The rent payable was Rs. 75 per annum and it was provided by cl. 2 of the deed of lease that it should be paid in advance for each year at the beginning of that year, *i.e.*, on the 11th November. In cl. 7 provision was made for renewal of the lease for a further period of 30 years on the expiry of the term of the lease. That clause has been translated thus.

"If the Company desires to take the said land on lease for a further period of 30 years, it should intimate Laxmichand Jainarayan at his Khamgaon shop by a notice its desire to that effect as soon as the aforesaid period of lease for 30 years expires and if such notice is received and provided the Company has during the 30 years acted as it ought to have done according to the conditions in this agreement of lease, Laxmichand should execute a fresh agreement of lease for a further period of 30 years as desired by the Company, on the conditions of this agreement of lease."

In accordance with this condition Messrs. Bruel and Company who were the managers of the Hingoli Press Company gave a notice on 9th February 1917 at Laxmichand's Khamgaon shop intimating the desire of the Company to obtain a fresh lease for a further term of 30 years on the expiry of the old lease but as Laxmichand failed to execute a fresh lease, the present suit was instituted on 13th November 1920.

Laxmichand the original lessor died somtime before the institution of this suit and on his death, the site covered by the lease fell, on a partition between the members of the joint family of which Laxmichand was the manager during his lifetime, to the share of defendant No. 1 who sold the said site to defendant No. 2 by a duly registered sale-deed, dated 13th October 1920 (Ex. P-5). The Hingoli Press Company's lease-hold rights in the site in dispute were also purchased by the plaintiffs under a sale-deed, dated 12th June 1920 (Ex. P-4) and hence plaintiffs brought this suit for renewal of the lease against the defendants.

Defendants pleaded that payment of rent on the due date during the term of the lease was a condition precedent to the renewal of the lease and that as the said condition had been broken by the lessee almost every year after 1892-93 plaintiffs were not entitled to claim renewal of the lease. They further pleaded that as defendant No. 2 was a minor and as he had purchased the site covered by the lease without notice of the condition of renewal the said condition could not be enforced against him.

Plaintiffs in reply pleaded that the understanding between the lessor and the lessee was that the rent for each year should be paid when the lessor or his agent would demand the same at Akola ; that according to this arrangement, it was paid to the lessor when he or his agent came to demand it at Akola ; that, moreover, the lessor having accepted late payments of rent and condoned the default, if any, it was not open to the defendant to plead such default as an answer to their (plaintiffs') claim for renewal of the lease. They urged that defendant No. 2 had purchased the site in dispute with full notice of the lease and the conditions contained therein and that he was, therefore, bound to renew the lease.

Both the Courts below held that there was an understanding between the lessor and the lessee that rent should be paid at Akola when the lessor or somebody on his behalf went there from Khamgaon to demand it, that the late payment of rent by the lessee was due to failure on the part of the lessor to send his man to Akola to receive payment and that the lessee was not responsible for late payment. They came to the conclusion that there was no wilful breach of the condition of the lease on the part of the lessee and that plaintiffs were consequently entitled to a renewal of the lease. Accordingly plaintiffs' claim was decreed. Defendant No. 2 has now preferred this appeal.

It is urged on behalf of the appellants that the Courts below erred in admitting evidence to prove that rent was payable at Akola to the lessee. In my opinion there is no substance in this contention. The deed of lease does not mention the place fixed for payment of rent and it was open to the plaintiffs to show that it was subsequently agreed between the parties that rent was to be paid at Akola to the lessee. In doing so, they did not contravene the provisions of s. 92 of the Evidence Act.

As Akola was the place fixed for payment of rent to the lessee and as the lessee or his agent was absent from that place when the rent for each year became due and rent was paid to him when he went there to receive it, the lessee is certainly not responsible for late payment of rent. He could not compel the lessor to go to Akola on the due date each year for receiving rent. In short, late payments of rent were entirely due to the negligence of the lessor to send his man in time to Akola to receive rent and not to any negligence on the part of the lessee. In this view of facts, the Courts below were fully justified in holding that if there was any breach in the condition of payment of rent, the lessee was not responsible for the breach.

Moreover, rents though paid late were accepted by the lessor without demur. By accepting rents willingly and without any protest, he condoned the breach and it is not now open to the defendants to rely upon the breach so condoned in resisting plaintiffs' claim for specific performance.

The cases relied upon by the learned Counsel for the appellant, *viz.*, *Finch* v. *Underwood* (1), *Bastin* v. *Bidwell* (2) and *Grevillee* v. *Parker* (3) are clearly distinguishable from the present case. In all those cases it was found that the lessee had failed to carry out certain covenants the performance of which was a condition precedent to the grant of renewal of lease and the breaches whereof were subsisting at the time when renewal of the lease was applied for. In those cases, it was not decided that delay in payment of rent though condoned was sufficient to defeat the claim for renewal of the lease. The lease before me contains no covenants (other than the one regarding punctual payment of rent) the performance of which was a condition precedent to the grant of renewal of the lease. It is true that the condition in regard to punctual payment of rent was broken by the lessee but the lessor who was entitled to forfeit the lease for breach thereof, waived his right in that respect and went on receiving payments of rent as if no breach had occurred. At the date on which renewal of the lease was applied for, there was no subsisting breach, all the previous breaches having been either waived or condoned. Under these circumstances it is not open to the defendants to take advantage of such condoned breaches to defeat plaintiffs' claim for renewal of the lease.

I may further point that where a lease contains a condition that renewal of the lease would be dependent upon the performance of certain covenants during the terms of the lease, that condition is deemed to have been satisfied if there is no sub-

(1) (1876) 2 Ch. D. 310; 45 L. J. Ch. 522; 34 L. T. 779; 24 W. R. 657.
(2) (1881) 18 Ch. D. 238; 44 L. T. 742.
(3) (1910) A. C. 335; 79 L. J P. C, 86; 10 L. T, 380; 26 T. L. R. 375.

sisting breach at the time renewal is applied for although there may have been breaches of covenants during the term of the lease. In this connection, the following observations of Mellish, L. J., in *Finch* v. *Underwood* (1) are apposite :—

" Under the terms of the covenant in the present case, the lease is to be granted only in case the covenants and agreements on the part of the tenants shall have been duly observed and performed. What does that mean ? I think it does not mean that the tenants must have strictly observed and performed the covenants all through the term, for the expression is, ' shall have been duly observed ; ' and I think that this is satisfied if they have been so observed and performed that there is no existing right of action under them at the time when the lease is applied for."

The above observations have been cited with approval by Kay, J , in *Bastin* v. *Bidwell* (2) and in *Ram Lal Dubey* v. *Secretary of State for India* (4), also, it has been held that where renewal is made conditional on the observance of covenants in the lease by the lessee, the right of renewal is enforceable if at the time of renewal there is no subsisting breach of covenant. I accordingly hold that the plaintiffs are entitled to claim specific performance of the covenant regarding renewal of the lease as they have satisfactorily proved that there was no subsisting breach of any of the conditions of the lease when renewal was applied for.

It is next urged that the right to ask for renewal of the lease was granted to the lessee alone under the lease in question and not to his heirs or assigns and that consequently plaintiffs who are assignees of the lessee are not entitled to ask for renewal of the lease. There is no substance in this contention. It has been held that the covenant for renewal of lease of land being a covenant running with the land, the assignee of the lease-hold is perfectly competent to enforce its terms· *Nava Kishore Das* v. *Madan Mohan Das* (5), *Secretary of State* v. *Forbes* (6). I accordingly hold that plaintiffs are entitled to claim renewal of the lease though they are not the original lessees but assignees of the lessee. For the same reason, I hold that the covenant for renewal is enforceable against defendant No. 2 who is the representative-in-interest of the lessor and who purchased the site in dispute with full knowledge of the lease-hold rights of the lessee. There is a specific mention of the lease in his sale-deed and he must be fixed with notice of the contents of the lease. The fact that he is a minor makes no difference in his liability arising under the terms of the lease.

The decree appealed against is correct and I dismiss this appeal with costs. Costs in the Court below will be paid as ordered by the lower Appellate Court.

G. R. D. *Appeal dismissed.*

Z. K.

(4) 51 Ind. Cas. 690; 29 C. L. J. 314.
(5) 69 Ind. Cas. 600; (1924) A. I R. (C.) 346.
(6) 17 Ind. Cas. 180; 16 C. L. J. 217.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 240 OF 1921.

December 10, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

JOGINDRA NARAYAN CHAUDHURI —PLAINTIFF—APPELLANT

versus

CHINAI MUHAMMAD SIRCAR— DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 89, 115—Principal and agent—Account, suit for—Agreement executed by agent—Limitation, commencement of.

A suit for an account by a principal against an agent is governed by Art. 89 of Sch. I to the Limitation Act, notwithstanding that the liability of the agent is regulated by an agreement executed by him in favour of the principal. In such a case limitation will begin to run from the date on which the services of the agent were dispensed with, unless it is shown that a demand was made at some earlier date. [p. 277, col. 1.]

First appeal from a decision of the Subordinate Judge, Purnea, dated the 27th April 1921.

Mr. *Lal Mohan Ganguly*, for the Appellant.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiff from a decision of the Subordinate Judge of Purnea, dated the 27th April 1921 dismissing the plaintiff's claim on the ground that it was time-barred under Art. 115 of the Limitation Act. The plaintiff has appealed and contends that the case is governed not by Art. 115 but by Arts 88 and 89 of the Limitation Act.

The facts shortly stated are that the plaintiff engaged the defendant as his agent to look after two villages and collect the

rents rendering an account to the plaintiff. There were two written agreements in the case one relating to each of the *mauzas*. The first was executed in the year 1905 and the other one in the following year. The claim is for an account of the collections made between the years 1312 and 1313 *B. S.* respectively for the two villages and the year 1323 *B. S.* which later year would cover the period between the middle of April 1916 and the middle of April 1917. The defendant was dismissed sometime in about *Assin* 1324 that is, in September or October 1917. He has rendered no accounts and the present suit was instituted on the 26th May 1920.

The learned Subordinate Judge before whom the case came for trial took the view that as the relations between the plaintiff and the defendant depended on a contract the case was governed by Art. 115. That Article provides for compensation for the breach of any contract, express or implied not in writing registered, and not herein specifically provided for. The period of limitation is three years and the time from which the period begins to run is the date when the contract is broken or where there are successive breaches when the breach in respect of which the suit is instituted occurs or when the breach is continuing when it ceases. The learned Judge in arriving at the conclusion that Art. 115 applied rather than the earlier Article relied upon the cases of *Jogesh Chandra* v. *Benode Lal Roy* (1) and *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhury* (2). With regard to the former case a registered contract was relied upon as bringing the case not within Art. 115 of the Limitation Act but within Art. 116. Now Art. 116 is not an Article which like the one immediately preceding applies only to cases not specially provided for in other parts of the Schedule. It applies to compensation for the breach of a contract in writing registered and it may well be that in a case of a registered contract that Article which gives six years as the period of limitation is to be preferred to Art. 89 which limits the period to three years only. Whether that interpretation of the Act is right or wrong we are not concerned with it in the present appeal. The question for determination here is whether Art. 115 which relates to a contract not in writing registered, not specially provided for in other parts of the Schedule is to be given preference to Art. 88 and Art. 89 where the suit clearly falls within those Articles. The first of the cases, therefore, relied upon by the learned Subordinate Judge does not appear to me to be any authority for the view which he appears to have taken in this case. It is true that in that case there is a *dictum* to the effect that where there is a definite contract to account at the end of the year the proper Article would be Art. 115 as the contract would be broken by the failure of the agent to account at the end of each year but it must be noted that in that case the contract was in writing and registered, and the Article which was applid was Art. 116. The *dictum* to which I have referred was based apparently upon the case of *Mati Lal Bose* v. *Amin Chand Chattopadhay* (3), a case in which again there was a *dictum* to the effect that Art. 115 would override the provisions of Art. 89 where both were applicable. This, however, was merely a *dictum* because the question in dispute in that case related to the effect of Art. 116 upon the earlier Article, namely, Art. 89 and it was not necessary for the Court in that case to consider what the effect would be in a case coming under the Article.

In the other case relied upon by the learned Judge, namely, *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhury* (2) again it was proved that there had been a demand and a refusal to render an account more than three years before the suit was brought and, therefore, it was of no moment whether Art. 89 or Art. 115 was applied. It was not necessary, therefore, in that case to consider the question under which of these Articles the suit came The matter, however, has been considered by other decisions in the Calcutta High Court and I need only refer to that of *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (4). That was a suit by a principal against his agent for an account and for recovery of money from him that might be found due. It was held there that it was a suit for moveable property received by the agent on behalf of the principal and not accounted for and was governed by Art. 89 of the Schedule to the Limitation Act. The learned Judges there pointed out that the cases to which I have already referred dealt merely with Art. 116 and were no authority for the proposition

(1) 5 Ind. Cas. 59; 14 C. W. N. 122.
(2) 5 Ind. Cas. 186; 11 C. L. J. 43.
(3) 1 C. L. J. 215.
(4) 32 C. 719; 1 C. L. J. 232.

that Art. 115 would override Art. 89 and in the result they found that Art. 89 was the proper Article to apply in such cases. If that is the proper Article to apply in the present case and, in my opinion, it undoubtedly is, then it would appear that the present suit is not barred by limitation. The learned Judge seemed to think that it was barred upon the allegations in the plaint and without taking any evidence he decided the suit against the plaintiff. He seems to have relied upon certain allegations in para. 4 of the plaint which states that "Notwithstanding the fact that he was repeatedly asked to submit collection and *nikas* (adjustment) papers he did not do so nor is he inclined to submit them. Therefore in *Asin* 1324 of the *Bangla* year, the plaintiff dispensed with his services in connection with the collection and realisation of the said *mauzas*." The learned Judge seems to have assumed that these repeated applications were applications made at the end of each financial year or that they were at all events at some period anterior to the time when the last collections were made and certainly anterior to three years from the time when the plaintiff brought his suit. There is nothing, however, in the plaint to indicate that any demand was made more than three years before the beginning of this suit. The suit was brought within three years from the date when the defendant's services terminated. Therefore the suit is *prima facie* in time unless it can be shown that some demand was made before that date with regard to all or some of the sums due for the years in question and that that demand was refused. That is a question of fact which will have to be gone into at the trial and, in my opinion, there is nothing in the plaint from which any such inference can be drawn. The appeal is allowed, the decision of the preliminary point arrived at by the Trial Court is set aside and the case is remanded under O. XLI, r. 23 of the C. P. C. to the Trial Court for decision of the other issues in the case.

Foster, J.—I agree.

Z. K. *Case remanded.*

CALCUTTA HIGH COURT.

APPLICATION FOR ADMISSION OF APPEAL IN SUIT No. 973 OF 1913.

August 13, 1924.

Present:—Sir Lancelot Sanderson Kt., Chief Justice, and Justice Sir Hugh Walmsley, Kt

KAMRUDDIN HYDER—DEFENDANT—APPELLANT

versus

M. N. MITTER—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12—Appeal filed beyond time—Extension of limitation—Sufficient cause—Time requisite for obtaining copy, what is—Duty of appellant.

In determining what is the requisite time for obtaining a copy of a judgment or decree referred to in s. 12 of the Limitation Act, the conduct of the appellant must be considered, and no period can be regarded as requisite under the section which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order. [p. 278, col. 1.]

Where a person desires to appeal against an order he must take reasonable and proper steps to obtain a copy of the order. Even where he makes an application for a copy of the order, if it is found that the other side is not taking any steps to get the order drawn up, it is his duty to take steps to get the order drawn up in order that an office copy may be supplied to him and that he may file it with his memorandum of appeal. [p. 278, col 2.]

Before the provisions of s. 5 of the Limitation Act can be applied, the appellant must satisfy the Court that he had sufficient cause for not filing the appeal within the specified period. [*ibid.*]

Mr. *S. N. Bhuttacharjee*, for the Appellant.

Mr. *S. N. Banerji*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an application for leave to file a memorandum of appeal which was rejected by the office on the 6th of August in this year.

It appears that the judgment against which it is desired to appeal was delivered on the 13th of May 1924, and on the 16th the appellant who was one of the defendants, sent a requisition to the office of this Court for a copy of the order. He took no further steps until towards the end of June. It appears that on the 13th of June a requisition by the respondent was made for the drawing up of the order; that order was settled on the 25th of June 1924 and according to the learned Counsel's statement it appears that the appellant was present at the settlement of the order on the 25th of June. On the 4th of July the order was signed by the learned Judge and it was filed on the 5th of July. On the 26th of July the stamps which were required for obtaining the office copy were put in by the appellant

It is alleged that the appellant did not get information as to the number of folios in respect of which the stamps were required until the 25th of July the day before the stamps were actually supplied.

The ground upon which the office refused to receive the appeal was that the requisition for the drawing up of the order had not been made within 20 days from the date of the order.

The time for appeal specified by the Limitation Act was twenty days from the 13th of May 1924, which time expired early in June. But the appellant relied upon s. 12, sub-s. (2) of the Limitation Act which provides as follows: "In computing the period of limitation prescribed for an appeal . . . the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the . . . . order appealed from . . . . shall be excluded." The learned Counsel has argued that inasmuch as the appellant made a requisition for a copy of the order on the 16th of May 1924 the whole of the period from the 16th of May until the time when the appellant obtained the office copy of the order ought to be excluded in computing the period of limitation. I cannot accept that argument.

The principle upon which these cases are to be decided cannot be better stated than in a passage in Lord Buckmaster's judgment in the case of *Pramatha Nath Roy* v. *Lee* (1) the passage being at page 1003* which is as folllows: "The learned Judges in the Appeal Court have held that in determining what is the requisite time referred to in s. 12, sub-s. (2), of the Limitation Act the conduct of the appellant must be considered, and their Lordships think that in so determining they have rightly regarded the statutory provision. In their Lordships' opinion, no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order."

In the present case, as I have already mentioned, the appellant applied for a copy of the order on the 16th of May. At that time the order was not drawn up but the appellant had the opportunity of applying for the order being drawn up if the party in whose favour the order had been made did not apply within four days from the date of the order so that at any time after the 17th or the 18th of May the appellant could have applied to the office for the drawing up of the order. He made no such application and, as I have already mentioned, it was the respondent who applied for the drawing up of the order on the 13th of June 1924 which was the last day of the month which is allowed under Ch. XXVI, r., 27 of the High Court Rules.

Now, the explanation if it can be called an explanation, which has been given is that the appellant thought that the respondent would take steps to get the order drawn up and that consequently he need not take any steps to do so himself. That argument has been presented in other cases similar to this and it has always been rejected and must be rejected again to-day. If the appellant desires to appeal he must take "reasonable and proper steps to obtain a copy of the order". Even though he has made an application for a copy of the order if it is found that the other side is not taking any steps to get the order drawn up, it is his duty to take steps to get the order drawn up in order that an office copy may be supplied to the appellant which, it must be remembered, he has to file with his memorandum of appeal.

Consequently, in this case, in my judgment, time has elapsed which need not have elapsed if the appellant had taken reasonable and proper steps to get the order drawn up and to obtain an office copy. Consequently, the appeal is out of time.

Then the learned Counsel relied upon s. 5 of the Limitation Act, and applied to this Court to use the discretion which is conferred upon it under s. 5. It is to be remembered, however, that before the provisions of that section can be applied the appellant must satisfy the Court that he had sufficient cause for not filing the appeal within the specified period. I have already stated that the only explanation for the delay which the learned Counsel has given on behalf of his client cannot be accepted. In my judgment he has not shown any sufficient cause for not filing the appeal in time.

(1) 68 Ind. Cas. 900; 49 C. 999; 49 I. A. 307; 31 M. L. T. 193; 37 C. L. J. 86; 21 A. L. J. 118; 27 C. W. N. 156; 43 M. L. J. 765; (1922) A. I. R. (P. C.) 352; 4 U. P. L. R. (P. C.) 103; 18 L. W. 156; (1923) M. W. N. 526 (P. C.).

*Page of 49 C.—[*Ed.*]

For these reasons in my judgment this application must be dismissed with costs.

Walmsley, J.—I agree.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 56 OF 1924.

February 26, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

NANAK CHAND-MUKANDI LAL—PLAINTIFF—PETITIONER

versus

EAST INDIAN RAILWAY—DEFENDANT—RESPONDENT.

Parties to suit—Suit against Railway Company—Defendant described as Agent, Railway Company—Misdescription—Amendment after expiry of limitation, effect of.

A suit was instituted against the Agent, East Indian Railway, but the plaint showed that the plaintiff's claim was against the East Indian Railway Administration as a Company and not against the Agent personally. The special attorney of the East Indian Railway filed written pleas on behalf of the Railway and no objectian was therein taken to the description of the defendant. After the expiry of limitation for the suit plaintiff applied for leave to amend the description of the defendant in the plaint, and on leave being given the defendant was described as "the East Indian Railway Administration, through the Agent". After the amendment the suit was dismissed as barred by time on the ground that it was instituted against the Railway Company after the expiry of the period of limitation :

Held, that the description of the defendant as the Agent, East Indian Railway, was only a misdescription, and that the suit was substantially against the Railway Company and had been so understood by it, and that, therefore, it could not be said that the suit was instituted against the Company on the date of amendment. [p. 280, col. 2.]

Saraspur Manufacturing Co., Ltd. v. *B. B. and C. I. Railway Co.*, 73 Ind. Cas. 1027; 47 B 785; 25 Bom. L. R. 513; (1923) A. I. R. (B.) 452, relied on.

Application for revision of an order of the Judge, Small Cause Court, Ambala, dated the 8th October 1923.

Mr. *Obedulla*, for the Petitioner.

Sardar *Dalip Singh*, (Government Advocate), for the Respondent.

JUDGMENT.—This is an application for revision of the order of the Judge, Small Cause Court, Ambala, dismissing the plaintiff's suit for damages against the East Indian Railway on the ground that it is barred by limitation. The suit was instituted on the 14th of February 1922, the defendants originally impleaded being as follows:—

1. The Agent, N.-W. R., Lahore.
2. The Agent, E. I. R., Calcutta.
3. The Secretary of State for India in Council.

On the 19th of April 1922 the special attorney of the East Indian Railway applied to have *ex parte* proceedings set aside and on the 15th of May 1922 filed written pleas on behalf of the Railway. In these pleas no objection was taken to the description of the defendant and it is quite clear that the special attorney for the East Indian Railway considered that the Railway itself was the defendant and not the Agent personally. On the 2nd of June 1922 the names of defendants Nos. 1 and 3 were struck out and the case proceeded against defendant No. 2 only. On the 27th of October 1922 arguments were heard and on the 17th of November a fresh issue was added. On the 18th of June 1923 plaintiff's Counsel asked for permission to amend the description of defendant No. 2 and the description was amended as follows: "The Agent, East Indian Railway, Calcutta," being altered into "East Indian Railway Administration, through the Agent, Calcutta." This amendment was made after the expiration of the period of limitation for bringing a suit against the Railway.

The Judge, Small Cause Court, following the case of *Sinehi Ram-Bihari Lall* v. *Agent, East Indian Railway Co.* (1) has held that the suit is time barred as the East Indian Railway was no party to it until the date on which the amendment above-mentioned was made. That was a decision by a Single Judge who remarked as follows:—

"In law the Company is not a defendant to the suit and is not before the Court as defendant. The frame of the suit can only be amended by substituting the Company as defendant in place of the Agent, and it is a well-recognised principle that, however liberal the Court may be in allowing amendments in the interests of justice, an amendment will not be allowed which would prejudice the rights of the opposite party existing at the date when the proposed amendment is to be made. At this stage the East Indian Railway Company has acquired a right by virtue of the Statute of Limitation and this right should not be prejudiced by any amendment at this stage."

Counsel for the petitioner relies upon the

(1) 64 Ind. Cas. 125; 2 P. L. T. 679.

case of *Saraspur Manufacturing Co., Ltd.* v. *B. B. and C. I. Railway Co.* (2) in which the above decision of the Judge of the Patna High Court was dissented from. That was a case against the B. B. & C. I. Railway Co., to recover damages for loss of goods. The defendant was described in the plaint as follows: "The Agent B. B. & C. I. Railway Co." It was held that there was only a misdescription in the title of the Railway Company and that the plaintiff should in the circumstances be given leave to amend the title by omitting the words "the Agent." Macleod, C. J., in discussing the Patna ruling stated as follows:—

"With all due respect I cannot agree with this reasoning. It seems to me in the interests of justice that if it can be said that there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. If the defendant Company could be considered as having had no notice that these suits had been brought against it by the plaintiffs, then undoubtedly limitation would be considered as running up to the date when the defendant Company had notice of the claims by being made a party to the suits. In my opinion, the fact that the word 'Agent' preceded the name of the Railway Company in the description of the defendant amounted merely to a misdescription."

The point again came before a Division Bench of the Patna High Court in the case of *East Indian Railway Company* v. *Ram Lakhan Ram* (3) where the previous decision of the Single Judge in *Sinehi Ram-Bihari Lal* v. *Agent, East Indian Railway Co.* (1) was referred to and approved and the case of *Saraspur Manufacturing Co, Ltd* v. *B. B. & C. I. Railway Co.* (2) was distinguished. The distinction drawn was that in the Bombay case, though the title of the defendant was entered in the plaint as the Agent B. B. & C. I. Railway Company, Ltd., the prayer was that the defendant Company should pay the amount sued for.

Now in the present case though the final prayer in the plaint was that a decree be passed in favour of the plaintiff against the defendants or such of them as might be found liable, still in para. 3 it was distinctly stated that either the East Indian Railway Administration as the booking line or the North-Western Railway Administration as the Railway which delivered the consignment to the plaintiff or both of them are legally responsible as bailee of the goods to compensate the plaintiff for the loss suffered. A reading of the plaint, therefore, clearly shows that the plaintiff's claim was against the East Indian Railway Administration as a Company and not against the Agent personally. If it was against the Agent at all it was against him as representing the Company. It is also clear by the action of Mr. McReddie, special attorney, East Indian Railway Co., that the latter was substantially on the record, had notice of the claim, and pleaded thereto. Under these circumstances we are of opinion that the present case is very similar to that of *Saraspur Manufacturing Co., Ltd.* v. *B. B. & C. I. Railway Co.* (1), and we agree with the decision of the Bombay High Court.

We, therefore, allow the revision and setting aside the order of the Judge, Small Cause Court, remand the case to him for decision on the merits.

Z. K. *Revision accepted.*

(2) 73 Ind. Cas. 1027; 47 B. 785; 25 Bom. L. R. 513; (1923) A. I. R. (B.) 452.

(3) 78 Ind. Cas. 312; 3 Pat. 230; (1924) Pat. 9; (1925) A. I. R. (Pat.) 37; 6 P. L. T. 415.

PATNA HIGH COURT.

In the matter of an application for substitution in SECOND CIVIL APPEAL No. 932 OF 1922.

December 19, 1924.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Adami.

SHIB DUTTA SINGH—PETITIONER

versus

Sheikh KARIM BAKHSH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of respondent—Application for substitution of some heirs of deceased—Application for substitution of other heirs after expiry of limitation, effect of—Abatement.

On the death of a respondent the appellant made a *bona fide* application for substitution of only two of the heirs of the deceased respondent on the record in place of the deceased as he had no knowledge of the existence of any other heirs. This application was made within limitation. After the expiry of the period of limitation for an application for substitution the appellant came to know of the existence of other heirs

of the deceased and put in an application to bring them on the record :

Held, (1) that an application for substitution having been made under sub-r. (3) of r. 4 of O. XXII of the C. P. C. the appeal could not abate ;

(2) that the application to bring the other heirs of the deceased on the record amounted only to an addition of the names of the other heirs in the category of the respondents and that on this application no question of limitation or abatement arose ;

Ram Anuj Sewak Singh v. *Hingu Lal*, 3 A. 517; 2 Ind. Dec. (N. S.) 263, *Krishnaji Janardan* v. *Murrarav*, 12 Bom. 48; 6 Ind. Dec. (N. S.) 518 and *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*, 26 M. 230; 12 M. L. J. 368, relied on.

Ghamandi Lal v. *Amir Begam*, 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136, *Haidar Husain* v. *Abdul Ahad*, 30 A. 117; 5 A. L. J. 62; A. W. N. (1908) 41; 3 M. L. T. 207 and *Bai Full* v. *Adesang*, 26 B. 203; 3 Bom L. R. 736, distinguished.

(3) that even if there had been an abatement the appellant was entitled in the circumstances of the case to have the abatement set aside and to have the names of the fresh heirs added on the record.

Mr. *Abani Bushan Mukerji*, for the Petitioner.

Mr. *Sailendranath Palit*, for the Opposite Party.

JUDGMENT.—It is clear upon the sworn petition of the appellant that he *bona fide* made an application for substitution of only two heirs of the deceased respondent No. 1 because he had no knowledge of the existence of the other two heirs, and after that when he came to know of their existence he made diligent inquiry and put in his application. Therefore, there can be no doubt as to the *bona fides* and the application is within time from the date of knowledge of the appellant. In this view the application should be granted, and the two daughters of respondent No. 1 mentioned above be also made respondents along with the other two heirs already brought on the record.

An objection has been taken by the learned Vakil on behalf of the respondent that the appeal had already abated so far as the heirs of respondent No. 1 now sought to be brought on the record are concerned, and that the present application for bringing them on the record is barred by limitation. Upon this view there is divergence of opinion. Personally speaking we are of opinion that the appeal in the present case did not abate, inasmuch as an application for bringing upon the record some of the heirs of the deceased respondent No. 1 was already made within time. Rule 4 of O. XXII, cl. (3), directs that the appeal shall abate where within the time limited by law no application is made under sub-r. (1). Here an application, as already observed, was made within time. Therefore, the appeal did not abate as against the deceased respondent. The respondent No. 1 having died the appeal could abate only if it was not continued against his representative by an application made within time, and the moment the application was made within time the appeal was saved from abatement. The bringing on the record subsequently of the other heirs of the deceased will be simply an addition of the names in the category of respondents. This view is supported by the cases of *Ram Anuj Sewak Singh* v. *Hingu Lal* (1) and *Krishnaji Janardan* v. *Murrarav* (2). Some support is also lent to this view by the decision in the case of *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (3). The other cases, however, are not exactly on the point. The cases relied upon on the other side, namely, *Ghamandi Lal* v. *Amir Begam* (4), *Haidar Husain* v. *Abdul Ahad* (5) and *Bai Full* v. *Adesang* (6) are not on all fours with the present case.

Even if there was abatement in the present case, the appellant is entitled, upon the facts clearly set forth in his sworn petition and not controverted by any counter-affidavit, to have the abatement set aside and to have the names of the fresh heirs added on the record. No doubt, in his application the appellant has prayed for substitution and addition of the daughters of the deceased respondent No. 1 as heirs in his place and has not clearly asked for setting aside the abatement; but reading the whole application and the prayer, the application can reasonably be construed as an application for setting aside the abatement and for substitution.

The application is, therefore, granted. Let the heirs proposed be brought on the record as respondents in place of the deceased respondent No. 1. In the circumstances of the case there will be no order as to costs.

Z. K. *Application granted.*

(1) 3 A. 517; 2 Ind. Dec. (N. S.) 268.
(2) 12 B. 48; 6 Ind. Dec. (N. S.) 518.
(3) 26 M. 230; 12 M. L. J. 68.
(4) 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136.
(5) 30 A. 117; 5 A. L. J. 62; A. W. N. (1908) 41; 3 M. L. T. 207.
(6) 26 B. 203; 3 Bom. L. R. 736.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 116 OF 1924.

March 26, 1925.

Present:—Mr Wazir Hasan, A. J. C.

ALI MOHAMMAD SHAH AND ANOTHER —DEFENDANTS—APPELLANTS

versus

GAURI SHANKAR LAL AND OTHERS— PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Subject-matter of suits, identity of, whether necessary.*

For the application of the principle of *res judicata* it is not necessary that the subject-matter, in the sense of the property involved, in the two suits should be the same.

Raja of Pittapur v. *Buchi Sitayya*, 12 I. A. 16; 8 M. 219; 4 Sar. P. C. J. 598; 9 Ind. Jur. 121; 3 Ind. Dec. (N. S.) 152 (P. C.) and *Ram Das* v. *Bhagwan Kunwar*, 88 Ind. Cas. 985; 2 O. W. N. 292; 12 O. L. J. 248; (1925) A. I. R. (O.) 390, referred to.

Second appeal against a decree of the Additional Sub Judge, Fyzabad, dated the 12th December 1923, upholding that of the Munsif, Akbarpur, District Fyzabad, dated the 20th April 1923.

Mr. *S. M. Ahmad*, for the Appellants.

Mr. *H. D. Chandra*, for the Respondents.

JUDGMENT.—This is the defendant's appeal. The suit, out of which it arises, was brought by the plaintiffs-respondents in the Court of the Munsif of Akbarpur for the recovery of Rs. 5 as one-fourth price of mango produce of grove No. 349 situate in village Dandwa, *Pargana* Surhurpur, District Fyzabad.

The plaintiffs are admittedly the *zemindars* of the village and the grove in question is possessed by the defendants as grove-holders. The plaintiffs claim *haq chaharum* on the basis of the custom prevailing in the village that the holders of the groves are liable to pay one-fourth of the produce of the fruits to the *zemindars*. The suit has succeeded in both the lower Courts.

One of the pleas in defence was that the suit was barred by the rule of *res judicata*. This plea has been rejected by the Courts below. The ground on which the decision of the Court below in respect of this plea is based is that the subject-matter of the former suit was not the same as the subject-matter of the present suit. As an abstract proposition this ground is obviously unsound. For the application of the principle of *res judicata* it is not necessary that the subject-matter in the sense of the property involved in the two suits should be the same. This was pointed out by their Lordships of the Privy Council so far back as the year 1885 in the case of *Raja of Pittapur* v. *Buchi Sitayya* (1) and recently in the judgment of the learned Judicial Commissioner in the case of *Ram Das* v. *Bhagwan Kunwar* (2).

I regret to say that in deciding the issue relating to the plea of *res judicata* the Courts below do not appear to me to have acted with sufficient propriety and care which they are bound to exercise in the decision of the case. The documents on which the defendants relied in respect of the plea under consideration are somewhat mutilated and fresh copies are not available for the reason that the original record has been weeded as it has transpired on an inquiry made by me. But mutilated though they are, it is not impossible, if sufficient attention is brought to bear on them, to discover what they are. Exhibits A-17 and A-18 are certified copies of a judgment passed by the Court of first instance in the previous suit and Ex. 13 is the decree of the Court of first instance in that suit. Exhibit A-15 is the decree of the Court of Appeal in the same suit. It is admitted that the parties to the litigation of 1880-1881 to which these documents relate, were the predecessors-in-interest of the parties to the present suit respectively. A careful perusal of these documents proves that the claim of the then plaintiffs was to recover *haq chaharum* in respect of the produce of grove No. 193. This is the same grove which is now in question. The claim failed. The defence raised in that suit was, as it is now, that the then defendants were not liable to pay the *haq chaharum* dues. This defence was adjudicated upon by the Court of first instance and upheld with the result that the suit was dismissed. The decree of the Court of first instance was affirmed on appeal. On these grounds I am of opinion that the plea of *res judicata* now raised succeeds.

The result is that the appeal is allowed, the decrees of the Court below are set aside and the plaintiffs' suit is dismissed with costs throughout.

G. H. *Appeal allowed.*

Z. K.

(1) 12 I. A. 16; 8 M. 219; 4 Sar. P. C. J. 598; 9 Ind. Jur 121; 3 Ind Dec. (N. S.) 152 (P. C.).

(2) 88 Ind. Cas. 985; 2 O. W. N. 292; 12 O. L. J 248; (1925) A. I. R. (O.) 390.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 41-B OF 1924.

April 15, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

AMBADAS—DEFENDANT—APPELLANT

versus

KASABAI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 239—Partnership—Test—Profits, right to participate in, effect of—Presumption.

A right to participate in the profits is a strong test of partnership, though the circumstance is not by itself conclusive. [p. 283, col. 2.]

Ross v. *Parkyns*, (1875) 20 Eq. 331; 44 L. J. Ch. 610; 30 L. T. 331; 24 W. R. 5, relied on.

The true test of partnership, however, is whether there was really a common business and whether the business was being carried on by the alleged partner or by some other person on his account so that he could be regarded as a principal. [p. 284, col. 1.]

Appeal against an order of the First Class Subordinate Judge, Akola, dated the 25th February 1924, in Civil Suit No. 17 of 1921.

Mr. *M. B. Niyogi*, for the Appellant.

Sir Dr. *H. S. Gour* and Mr. *M. B. Marathe*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for rendition of partnership accounts and for recovery of Rs. 7,443-8-8 as her share of profits in the partnership business. Plaintiff is the step-mother-in-law of the defendant. She alleged that on or about 9th November 1917 it was agreed between the parties that they should carry on cotton business in partnership at Murtizapur during the cotton season of the year 1917-18, that she was to supply capital and defendant was to make sales and purchases of cotton, maintain accounts and manage the whole business, that the share of each party in the partnership business was 8 annas, that the defendant under the terms of the agreement managed the whole of the business and maintained the partnership accounts and that when after the expiry of the term of partnership he was called upon to render accounts, he refused to do so.

Defendant denied the alleged agreement of partnership between him and the plaintiff. He alleged that the plaintiff alone carried on cotton business at Murtizapur during the cotton season of 1917-18 through her agents and servants. He pleaded that it was agreed between them and the plaintiff that he should simply advise her agents in the management of the business, and that for his advice he should get 4-annas share of the profits of the business. He denied that he had anything to do with the keeping of accounts and alleged that the accounts were maintained by plaintiffs' servant Damodar, who managed the business on her behalf. He, therefore, denied his liability for rendition of accounts and for payment of the profits of the cotton business to the plaintiff.

The Court below held that there was partnership between the parties as alleged by the plaintiff, each having 8-annas share in the partnership business, that the defendant maintained the accounts of the partnership and was in possession thereof and that he was liable to render the accounts of the business to the plaintiff. It accordingly passed a preliminary decree for rendition of accounts against the defendant, who has now preferred this appeal.

The witnesses examined by both of parties in proof of their allegations are highly interested persons. The Court below has discussed their evidence at considerable length and I do not propose to discuss it over again. It is, however, admitted by the defendant that the agreement between the parties was that they should share the profits of the business. It has been held that a right to participate in profits is a strong test of partnership, though that circumstance is not by itself conclusive In *Ross* v. *Parkyns* (1), Jessel, M. R., has observed.

"It is said (and about that there is no doubt) that the mere participation in profits *inter se* affords cogent evidence of partnership. But it is now settled by the cases of *Cox* v. *Hickman* (2), *Bullen* v. *Sharp* (3) and *Mollwo* v. *Court of Wards* (4), that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive."

It will appear from the above observations that the true test is whether there was

(1) (1875) 20 Eq. 331; 44 L. J. Ch. 610; 30 L. T. 331; 24 W. R. 5.

(2) (1860) 8 H. L. C. 268; 9 C. B. (N. S.) 47; 30 L. J. C. P. 125; 7 Jur. (N. S.) 105; 3 L. T. 185; 8 W. R. 754; 11 E. R. 431; 125 R. R. 148; 142 E. R. 19.

(3) (1866) 1 C. P. 86; 1 H. & R. 117; 35 L. J. C. P. 105; 12 Jur. (N. S.) 247; 14 L. T. 72; 14 W. R. 338.

(4) (1873) 4 P. C. 419.

really a common business and whether the business was being carried on by the defendant or by some other person on his account so that he could be regarded as a principal. In the present case the Court below has pointed out various circumstances which go to show that the relation between the parties in the cotton business in question was that of partners and I fully agree with the conclusion arrived at by that Court. The evidence on record leaves no room for doubt that defendant not only had large powers of control over the business but had also the power to direct transactions. He used to make purchases and sales in a manner leaving no room for doubt that he had common interest in the cotton business. He has admitted that for over a fortnight after the business was started he alone used to manage it. Had he really been simply an adviser of the plaintiff as alleged by him he would never have carried on the business in the way he did in the absence of plaintiff's men ? Moreover, I have no reason to doubt that Damodar, who was maintaining the accounts of the business was really a servant of the defendant and not of the plaintiff, and that the whole business was being carried on by the defendant as a partner. Had the defendant not been a partner and had he not been in possession of the accounts, he would surely have instituted a suit against the plaintiff for his 4-annas share of profits. The letters written by him from time to time which have been filed in this case clearly prove that he directed and controlled the business and had common interest in it. The whole correspondence on the subject has been fully discussed by the Court below and I agree with it in holding that it goes to prove that the plaintiff and defendant were partners in the cotton business. I further agree with that Court in holding that the accounts of the business are in the possession of the defendant and that Court was perfectly justified in passing a preliminary decree against the defendant for rendition of accounts It is no doubt true that the partnership business was carried on in the name of Krishnaji Rukhabsa which is the name of plaintiff's firm, but that was obviously because Krishnaji Rukhabsa's firm had acquired a reputation of its own and it was quite open for the partners to adopt that name in carrying on partnership business.

It is urged before me that on the income-tax return for year 1917-18 submitted by the plaintiff the profits of the partnership in question were not shown. Assuming this to be a fact, the reason for not entering the profits of the partnership business in the income-tax return obviously was that the account books of the partnership were in possession of the defendant and no account of the profit and loss in connection with that business had been made. It was not possible for the plaintiff to mention the profits of the business in the income-tax return as no account of the profits of the business had been made. It is no doubt true that in Ex. P-17 plaintiff has stated that she "trades singly." This must, however, be interpreted in connection with the answer to question No. 7 in Ex. D-1. What the plaintiff obviously meant was that she was worth Rs. 60,000 and that in her business which was worth Rs. 60,000 she had no partner. In short, having considered all the probabilities and circumstances of the case I come to the conclusion that the evidence of plaintiff's witnesses, who have deposed that the agreement between the parties was that they should carry on the business in partnership with equal shares, that plaintiff should supply capital and that defendant should manage the business and maintain accounts, is perfectly true. The decree of the lower Court is correct and I dismiss this appeal with costs. Pleader's fee Rs. 100.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 233 OF 1924.

May 13, 1925.

Present:—Mr. G. N. Misra, A. J. C.

Musammat ZAIB-UN-NISA—PLAINTIFF—APPELLANT

versus

IRSHAD HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 65—Document in possession of opposite party—Secondary evidence, admissibility of—Muhammadan Law—Gift—Musha, doctrine of, applicability of.

Section 65 of the Evidence Act lays down that secondary evidence may be given of the contents of a document when the original is shown or appears to be

in the possession or power of the person against whom the document is sought to be proved. It does not require that in all cases it must be definitely proved that the document is in the possession of the other side against whom it is sought to be proved, it is sufficient if it is proved that the document appears to be in its possession. [p. 285, col. 2.]

Where possession of the entire property gifted to several persons passes in definite shares to all the donees, no objection can be taken to the validity of the gift on the doctrine of *mushaa*, although the deed of gift does not in so many terms state the shares which the donees are to have in the property gifted. [p. 286, col. 1.]

The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules and narrowest possible limits. [*ibid.*]

Muhammad Mumtaz Ahmad v. *Zubaida Jan*, 11 A. 460; 16 I. A. 205; 5 Sar. P. C. J. 433; 6 Ind. Dec. (N. S.) 721 (P. C.), *Sharifa Bibi* v. *Gulam Mahommed Dastgir Khan*, 16 M. 43 at p. 49; 3 M. L. J. 14; 5 Ind. Dec. (N. S.) 738 and *Hafiz-un-nisa* v. *Jawahir Singh*, 66 Ind. Cas. 24; 24 O. C. 374, followed.

Second appeal against a decree of the Subordinate Judge, Sultanpur, dated the 29th February 1924, reversing that of the Munsif, Musafirkhana, dated the 16th November 1923.

Mr. *Naimatullah*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal in a suit for declaration. One Amanat Ali, the father of the plaintiff, was admittedly the owner of the property in dispute. He had three daughters, *Musammat* Zaib-un-nisa, the plaintiff, *Musammat* Chhittan and *Musammat* Rahmatan. The defendant No. 1, Irshad Husain, is the son of *Musammat* Chittan and defendant No. 2, Muhammad Amin, is the son of *Musammat* Rahmatan. *Musammat* Chittan and *Musammat* Rahmatan had predeceased Amanat Ali. It is alleged that prior to his death in October 1921 Amanat Ali had made a gift of his property in favour of the plaintiff, *Musammat* Chittan, the mother of defendant No. 1, and Muhammad Amin, defendant No. 2, on the 8th November 1918. The gift comprised the lands situate in village Tiri Machhrauli, *Pargana* Bharansa, District Sultanpur, owned by Amanat Ali and a dwelling house and some miscellaneous trees in the same village. Relying upon this deed of gift the defendants Nos. 1 and 2 applied to the Revenue Court for partition of their two-thirds share in the said lands. The plaintiff raised an objection in the Revenue Court to the partition, denying the alleged gift and contending that she was the owner of the entire property. The Revenue Court referred her to the Civil Court to get her title adjudicated upon and it is in pursuance of that order that the plaintiff has brought the present suit.

The Munsif of Musafirkhana held that the gift was not established and even if established was invalid and thereupon decreed the plaintiff's suit. The defendants appealed against the said decision and the learned Subordinate Judge of Sultanpur accepted the appeal and dismissed the plaintiff's suit. It is against that decision that the present appeal has been lodged by the plaintiff in this Court.

In appeal it is contended before me that the learned Subordinate Judge was wrong in accepting secondary evidence of the deed of gift. I do not agree with this contention. The defendants relied upon the deed of gift and stated in their written statement that it was in the possession of the plaintiff. The learned Subordinate Judge has after considering all the circumstances of the case come to the conclusion that in his opinion the deed of gift appeared to be in the possession of the plaintiff and consequently he admitted secondary evidence under s. 65 of the Indian Evidence Act. That section lays down that secondary evidence may be given of the contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. The document executed by Amanat Ali as stated above was in favour of three individuals, the plaintiff being one of them. It is only reasonable to infer that the said deed must have been in the possession of the donees, one of whom is the plaintiff herself. If the deed of gift had been in the possession of the defendants I fail to see what reason there could be for their not producing the document on which their title to the property in dispute rested. I am, therefore, compelled to infer that the document is in the possession of the plaintiff. The law as laid down in s. 65 does not require that in all cases it must be definitely proved that the document is in possession of the other side against whom it is sought to be proved, it being sufficient if it is proved that the document appears to be in his possession. I think the learned Subordinate Judge has rightly allowed the defendants to give secondary evidence of the deed of gift and I reject the plaintiff's contention.

The second contention raised before me by the learned Counsel for the plaintiff-appellant is that the deed of gift is invalid on the doctrine of *mushaa*. It is clear from the record that although the deed of gift did not in so many terms state the shares which the donees were to have in the property gifted to them yet it is clear from the *khewat* (Ex. A-7) that mutation of names was effected in favour of *Musammat* Chhittan, *Musammat* Zaib-un-nisa the plaintiff and Muhammad Amin in equal shares of one-third each. The *khasras* and the *khataunis* afford evidence in the same direction. It is, therefore, clear that any defect due to *mushaa* was cured by the donees having taken possession in definite shares. Apart from this the doctrine of *mushaa* has been held by their Lordships of the Privy Council to be one arising out of an archaic state of society and should be confined within the narrowest possible limits—*vide Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1). Their Lordships have held that the doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules. The same view was taken by their Lordships of the Madras High Court in the case of *Sharifa Bibi* v. *Gulum Mahommed Dastgir Khan* (2). This question was recently considered by a Bench of this Court in *Hafiz-un-nisa* v. *Jawahir Singh* (3). There is also evidence on the record that the dwelling house of Amanat Ali was taken possession of after his death by the defendants and the plaintiff—*vide* D. W. 1, I. P. 8.

Under these circumstances I hold that possession of the entire property gifted by Amanat Ali had passed in definite shares to all the donees, namely, the plaintiff and the defendants, and no objection can be taken to the validity of the gift on the doctrine of *mushaa*. I, therefore, reject the second contention also.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 11 A. 460; 16 I. A. 205; 5 Sar. P. C. J. 423; 6 Ind. Dec. (N. S.) 721 (P. C.).

(2) 16 M. 43 at p. 49; 3 M. L. J. 14; 5 Ind. Dec. (N. S.) 738.

(3) 66 Ind. Cas. 24; 24 O. C. 374.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 316 OF 1924.

May 22, 1925.

Present :—Mr Justice Lindsay and Mr. Justice Kanhaiya Lal.

KASHI PRASAD AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Babu MATHURA PRASAD AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Partition decree directing payment of sum of money by one set of defendants to another—Appeal by plaintiffs, dismissal of—Execution of decree—Limitation, commencement of.

A final decree in a partition suit directed the payment of a certain sum of money by one set of defendants to another set of defendants. The plaintiffs in the suit filed an appeal against the final decree which was dismissed. The different sets of defendants were made parties to the appeal :

Held, that the final decree in the suit was a single decree and that when an appeal was filed against that decree the entire decree was under review and if it had happened that any relief had been given to the appellants in the appeal the necessary consequence would have been that the whole decree would have been altered and that, therefore, limitation for execution of the decree in respect of the sum awarded to one set of defendants under the decree began to run from the date on which the appeal was dismissed and not from the date on which the decree was passed. [p. 287, cols. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Ghazipur, dated the 12th March 1924.

Messrs. *Sankar Saran* and *Janaki Prasad*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This is an appeal in the execution department. It appears that on the 19th of March 1923 Babu Mathura Prasad and Harbans Prasad made an application for execution against the appellants here, namely, Kashi Prasad and Madan Mohan Prasad, to recovera sum of Rs. 3,152.

The appellants here challenged the application alleging that it had been made beyond time and was not maintainable. The Court below has held that the application is within limitation and now we have this appeal in which we are asked to find that the order of the Court below is wrong.

The application now under consideration was based upon an order contained in a decree which was passed on the 29th January 1917. That was a final decree in a partition suit. In that suit the present appellants were arrayed as the third set of defendants and Mathura Prasad and Harbans Prasad who have made this

application for execution were arrayed as the first and fourth sets of defendants.

Under the terms of the final decree passed by the Court below on the 29th January 1917 the third set of defendants were directed to pay to Mathura Prasad the first set of defendants and Harbans Prasad the fourth set of defendants, Rs. 2,335-8-3.

If limitation for the application which we are now considering is to be deemed to run from the date of this final decree there might be some force in the objection which was made by the present appellants. It appears, however, that on the 20th November 1917, the plaintiffs in that suit, Nandan Prasad and others filed an appeal against the final decree in the High Court. That appeal was finally disposed of by this Court on the 9th of February 1922. This Court dismissed both the appeal and the cross-objections. It is stated that neither Mathura Prasad the first set, nor Harbans the fourth set nor the present appellants Kashi Prasad and Madan Mohan the third set raised any objections to the final decree in the course of this appeal by way of cross-objection or otherwise. On the other hand, it is admitted that these persons were all parties to the appeal in this Court.

We are of opinion that the Subordinate Judge was right in holding that limitation for the execution of this decree which we are now dealing with began to run from the date of the High Court's decree, that is to say, the 9th of February 1922. We do not think it can be maintained that because the present appellants here or the present respondents did not challenge the final decree in the proceedings by way of appeal which were taken in this Court that, therefore, their relations are governed entirely by the final decree of the 29th January 1917 as passed by the Trial Court.

It is clear to us that when the appeal against the final decree was filed by the plaintiffs in the partition suit the entire partition was under review, and if it had so happened that any relief had been given to the plaintiffs-appellants in that appeal the necessary consequence would have been that the whole partition decree would have had to be altered. In our opinion the decree must be treated as a single decree and not as a series of decrees in favour of or against the various parties to the case. We are referred by the appellant's learned Counsel to the Full Bench ruling of this Court reported as *Mashiat-un-nissa* v. *Rani* (1). That case is clearly distinguishable from the case which we are now dealing with. We hold that the Court below was right in the view it took of this question of limitation and we dismiss this appeal accordingly with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 13 A. 1; A. W. N. (1890) 207; 7 Ind. Dec. (N. S.) 1.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 89 OF 1924.

April 20, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

SHEO DULARE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAIJ NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Hindu Law—Joint family—Sale by father—Son, whether can pre-empt.

A Hindu co-parcener cannot pre-empt a sale made by his father by reason of the fact that he is a co-sharer as a member of the joint family in some other portion of the tenure. [p. 288, col 1.]

Gajadhar v. *Lal Behari*, 88 Ind Cas. 879; 12 O. L. J. 202; 2 O. W. N. 264; (1925) A. I. R. (O.) 352; 28 O. C. 139, followed.

Appeal against a decree of the Subordinate Judge, Unao, dated the 24th November 1923, modifying that of the Munsif, Safipur, at Unao, dated the 4th April 1923.

Mr. *H. N. Misra*, for the Appellant.

Mr. *G. N. Misra*, for the Repondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption and the plaintiffs are the appellants. At the last hearing of this appeal the learned Counsel for the appellants withdrew the appeal, so far as the appellants Sheo Dulare, Badri Prasad and Sheo Mangal are concerned. The appeal, therefore, in so far as these three appellants are concerned will stand dismissed.

It now remains to consider the question of the title of the 4th plaintiff Rameshwar to pre-empt the property in suit. The sale

which has given rise to the suit for pre-emption was made by the father of Rameshwar in respect of plot No. 1085 situate in *mahal* Raghubar Dayal of village Dehgaon, *pargana* Safipur, District Unao.

At the last hearing of the appeal the issue was remitted to the lower Court for a finding as to whether Rameshwar is a co-sharer in plot No. 1067 in the capacity of a member of a joint Hindu family or otherwise. The *khata* in which the plot in suit is situate consists of that plot and plot No. 1067. The argument in appeal was that in virtue of the plaintiff's interest as a member of a joint Hindu family in plot No. 1067 he was entitled to pre-empt the sale of plot No. 1085 in the status of a co-sharer. The Court below has found that issue in the affirmative and in favour of the plaintiff Rameshwar. The respondents have filed a cross-objection to the finding of the lower Appellate Court. In virtue of the subsequent developments which I shall presently state, it is not necessary to decide the objection, nor is it necessary to confirm the finding as a matter of fact for the disposal of this appeal.

The plaintiff Rameshwar's case was that he was a co-sharer by reason of his being a member of a joint Hindu family in plot No. 1067. Since the order of remand it has been held recently in this Court by a majority of Judges in the case of *Gajadhar* v. *Lal Behari* (1), that a plaintiff cannot pre-empt the sale made by his father by reason of the fact that he is a co-sharer as a member of a joint Hindu family in some other portion of the tenure. The plaintiff's case must fail on his own allegations and in that view of the case the finding as to whether, as a matter of fact, he was a co-sharer in plot No. 1067 by reason of his being a member of joint Hindu family becomes unnecessary and that question must not be deemed to have been decided in this case. The plaintiff's title must fail on his own allegations.

The appeal is, therefore, dismissed. As to the costs of the appellant, Rameshwar was justified in filing the appeal to this Court in view of the state of authority on the date of the appeal. His appeal fails by reason of the subsequent decision mentioned above. It is, therefore, fair that there should be no order as to costs in this appeal. I order accordingly.

Z. K. *Appeal dismissed.*

(1) 88 Ind. Cas. 879; 12 O. L. J. 202; 2 O. W. N. 264; (1925) A. I. R. (O.) 352; 28 O. C. 139.

ALLAHAHAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 220 OF 1924.

May 8, 1925.

Present:—Mr. Justice Sulaiman.

SAHU BANARSI PRASAD AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

Kuer MANMOHAN LAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 4—Mortgage-decree—Amount found due on mortgage, whether includes costs of suit—Interest, whether can be allowed on costs.

The expression "subsequent interest" in r. 4 of O. XXXIV of the C. P. C. means subsequent interest on the aggregate amount found due under r. 2 of the Order and this amount includes costs of the suit. The intention of the rules is that a general account should be taken once for all and that an aggregate amount should be stated in the decree for principal, interest and costs due on the fixed day and that after the expiry of that day if the property should not be redeemed the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of his bond but on the directions in the decree. Interest is allowed on the aggregate sum mentioned in the decree which includes the costs of the suit and not merely on the principal money. No subsequent interest, however, can be allowed on costs incurred subsequently to the decree. [p. 289, col. 2.]

Sundar Koer v. *Rai Sham Krishen*, 34 C. 150 at p. 161; 9 Bom. L. R. 304: 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106; 34 I. A. 9 (P. C.) and *Venkatachallapathi Aiyar* v. *Thavasi Servai*, 51 Ind. Cas. 67; 42 M. 465; 36 M. L. J. 288, relied on.

First appeal from a decree of the Subordinate Judge, Bareilly, dated the 11th February 1924.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *S. B. Johari*, for the Respondents.

JUDGMENT.—This is a decree-holders' appeal arising out of a mortgage-decree for sale in execution. The claim was decreed for a sum of Rs. 16,793 with interest at six per cent. per annum. When the preliminary decree was prepared the 5th of February 1919 was fixed as the date for the payment of the money, and the amount of principal, interest and costs found due to the decree-holders on the 5th of February 1919 was put down in the decree as being Rs. 17,918 6-9 and it was stated that the aforementioned sum should bear interest at six per cent. per annum till the date of realization. The decree further provided that if by that day no payment was made then the property would be sold and out of the sale-proceeds the amount found due to

the plaintiffs as aforesaid together with subsequent interest and costs should be deducted and whatever remained as surplus would be paid over to the defendants. This decree is in perfect concurrence with the directions contained in O. XXXIV, r. 4 read with r. 2 and the form attached to the Code. No money was paid in time with the result that a final decree was prepared which directed that the property should be sold and the proceeds of the sale should be applied towards the payment of Rs. 17,930-14-6 together with subsequent interest and costs.

The judgment-debtors subsequently prevented the sale of the property by payment of Rs. 20,686-3-3. Having done so they have now applied to the Court for a refund of Rs. 285-3-3 on the ground that that amount was over-paid. Their contention is based on the ground that under the decree no interest on the costs amounting to Rs. 957-7-0 should be allowed. The Court below has acceded to this contention and ordered a refund, hence this appeal.

In my opinion this appeal must prevail. In the first place the decree as it stands even if it had been a wrong decree, entitles the decree-holders to interest on the aggregate amount of Rs. 17,930-14-6 at six per cent. per annum till the date of realization even though that aggregate amount includes costs. Both the preliminary and the final decrees fixed the 5th of February 1919 as the day for payment, and Rs. 17,930-14-6 as the amount due on that date, and directed that the amount so found due should bear interest at six per cent. per annum. The judgment-debtors, therefore, are not entitled to claim any deduction. I, however, find that not only the decree-holders are entitled to interest on the costs under the two decrees but that the decrees themselves are in perfect concurrence with the provisions of O. XXXIV. If one examines O. XXXIV, r. 2 one sees at once that a decree should order that an account is to be taken of what will be then due to the plaintiff for principal and interest on the mortgage and for his costs of the suit awarded to him on the day next referred to and that it should be declared the amount so due at the date of such decree. Then r. 3 provides that in a suit for sale the Court shall pass a decree to the same effect and also directing that in default of the defendant paying as therein mentioned the property would be sold and the proceeds of the sale applied in payment of what is due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, etc. It is clear that the subsequent interest means subsequent interest on the aggregate amount so found due. As observed by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (1), the intention seems to be that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on the fixed day and that after the expiration of that day if the property should not be redeemed the matter should pass from the domain of contract to that of judgment and the rights of the mortgagee should thenceforth depend not on the contents of his bond but on the directions in the decree. The interest is allowed on the aggregate sum and not merely on the principal money and this is right if the mortgagee is treated as a decree-holder or judgment-creditor. This view was followed by the Madras High Court in *Venkatachallapathy Aiyar* v. *Thavasi Servai* (2) with which I agree.

Of course no subsequent interest on subsequent costs will be allowed.

The result, therefore, is that this appeal is allowed and the decree of the Court below directing a refund of Rs. 285-3-3 with interest is set aside. The appellants will be entitled to their costs of this appeal.

Z. K. *Appeal dismissed.*

(1) 34 C. 150 at p. 161; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75; 4 A. L. J. 109; 5 C. L. J. 106; 31 I. A. 9 (P. C.).

(2) 51 Ind. Cas. 67; 42 M. 465; 36 M. L. J. 288.

CALCUTTA HIGH COURT.
FULL BENCH.

FULL BENCH REFERENCE No. 4 OF 1924
IN REFERENCE No. 7 OF 1924.
June 29, 1925.

Present:—Justice Sir Hugh Walmsley, KT., Justice Sir Ewart Greaves, KT., Mr. Justice C. C. Ghose, Mr. Justice B. B. Ghose and Mr. Justice Mukerji.

In re REFERENCE FROM THE MUNSIF, FOURTH COURT, HABIGANJ.

Civil Procedure Code (Act V of 1908), O. XXXII,

r. 6 (2)—Court Fees Act (VII of 1870), Sch. II, Art. 6—Stamp Act (II of 1899), Sch. I, Arts. 15, 40, 57—Security bond executed under orders of Court—Court-fee payable—Bond, whether liable to stamp duty.

A security bond executed in pursuance of an order of the Court under O. XXXII, r 6 (2) or any other rule or section of the C. P. C. must bear a Court-fee stamp as required by Art. 6 of Sch. II to the Court Fees Act and it will also be chargeable under the Stamp Act if it is a bond of the kind described in Art. 40 or Art. 57 of Sch. I to the Stamp Act, but it will not be chargeable under the Stamp Act if it falls under the residuary Art. 15 of Sch. I to the Act. [p. 291, col. 1.]

Reference made by the Munsif, Fourth Court, Habiganj, on the 20th August 1924, under s. 113 read with O. XLVI, C. P. C.

ORDER OF REFERENCE.

Greaves and Chakravarti, JJ.— The Munsif of the Fourth Court, Habiganj, District Sylhet, has under the provisions of the above section and Order referred to the Court the question whether a security bond executed under the order of the Court passed under O. XXXII, r. 6 (2) or under any other section or rule of the C. P. C. should be stamped under the Court Fees Act or under the Stamp Act. Holmwood and Teunon, JJ., held in the case of *Dwarika Nath Dey* v. *Sailaja Kanta Mallick* (1) that security bonds given in pursuance of an order of the Court for stay of execution should be stamped under the Stamp Act. Newbould and Panton, JJ., have recently held in *Sarbo Mussalmani* v. *Safar Mandal* (2) that a security bond executed by a person for the release of attached animals should be stamped under Art. 6, Sch. II of the Court Fees Act.

It would, therefore, appear that there is a conflict between the decisions of two Division Benches of this Court on the question which arises on this Reference. Under these circumstances we refer for the decision of a Full Bench of the Court the question whether a security bond executed under the order of the Court passed under O. XXXII, r. 6 (2) or under any other order or section of the C. P. C should be stamped under the Court Fees Act or under the Stamp Act.

There was no appearance before us on the Reference.

Babu *Surendra Nath Guha*, for the Government.

JUDGMENT OF THE FULL BENCH.

Walmsley, J.— The circumstances which have given rise to this Reference are as follows:—In an execution case at Habiganj, the next friend of a minor decree holder was directed to furnish security under O. XXXII, r. 6 (2), of the C. P. C. before receiving certain money on behalf of the minor. He filed a security bond, and then a question arose as to whether the bond was to be stamped under the Court Fees Act, or under the Stamp Act. The learned Munsif found that there were two conflicting decisions on the point, *viz.*, the case of *Dwarika Nath Dey* v. *Sailaja Kanta Mallick* (1) and that of *Sarbo Mussalmani* v. *Safar Mandal* (2) and he referred the question to this Court under the provisions of O. XLVI, r. 1 of the C. P. C.

A Division Bench finding the two decisions to be directly opposed to one another has referred for the decision of a Full Bench the question whether a security bond executed under the order of the Court passed under O. XXXII, r. 6 (2) or under any other order or section of the C. P. C. should be stamped under the Court Fees Act or under the Stamp Act.

The learned Government Pleader has appeared before us, and has suggested that our answer should be to this effect, that such security bonds should be stamped under Art. 6, Sch. II of the Court Fees Act unless they are of such a nature as to attract the operation of Art. 40 or Art. 57 of the Stamp Act.

Article 6 of Sch II of the Court Fees Act now runs: "Bail bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Cr. P. C. or the C. P. C."

I feel no hesitation in holding that a security bond of the kind mentioned in the Munsif's letter comes within the description. With all deference to the learned Judges who decided the case of *Dwarika Nath Dey* v. *Sailaja Kanta Mallick* (1), I think they placed too narrow a meaning on the words "in pursuance of." Compliance with a condition imposed by a Court is, in my opinion, an act done in pursuance of the Court's order; and I think that the narrow construction proposed in the judgment mentioned would render Art. 6 nugatory.

It does not follow, however, that because a security bond falls within the scope of Art. 6, Sch. II of the Court Fees Act, it is free from the provisions of the Stamp Act. This Act contains a clause—s. 2 (5)—

(1) 43 Ind. Cas. 376; 21 C. W. N. 1150.
(2) 66 Ind. Cas. 730; 49 C. 997; (1923) A. I. R. (C.) 269.

which enumerates three kinds of instruments which are to be regarded as bonds. Then in Sch. I there are three Articles which have a bearing on the question before us, *viz.*, Arts. 15, 40 and 57. They are as follows :—

Article 15. [Bond as defined by s. 2 (5)] not being a Debenture (No. 27) and not being otherwise provided for by this Act, or by the Court Fees Act, 1870.

Article 40 Mortgage-deed, not being an agreement relating to deposit of title-deeds, Pawn or Pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a Crop (No. 41), Respondentia Bond (No. 56) or Security Bond (No. 57).

Article 57. Security bond or mortgage-deed executed by way of security for the due execution of an office or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.

A comparison of these Articles shows that Art. 15 is of a residuary character intended for bonds which cannot be assigned to any other of the Articles of the Stamp Act and are not provided for by the Court Fees Act. It is the only Article in which reference is made to the Court Fees Act. It follows, therefore, that a bond which finds its proper place in one of the other Articles is not exempt from duty under the Stamp Act and, at the same time, as being given in pursuance of the Court's order, it is liable under Art. 6 of Sch. II of the Court Fees Act.

The answer that I propose to the Reference is that security bonds executed in pursuance of an order of the Court under O. XXXII, r. 6 (2) or any other rule or section of the C. P. C. must bear a Court-fee stamp as required by Art. 6 of Sch. II of the Court Fees Act, 1870; and they will also be chargeable under the Stamp Act if they are of the kind described in Art. 40 or Art. 57, but they will not be chargeable under the Stamp Act if they fall under the residuary Art. 15.

Greaves, J.—I agree.

C. C. Ghose, J.—I agree.

B. B. Ghose, J.—I agree.

Mukerji, J.—I agree.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 449 OF 1924.

May 21, 1925.

Present:—Mr. Justice Sulaiman and Mr Justice Daniels.

Pandit FAQIR CHAND AND ANOTHER —JUDGMENT-DEBTORS—APPELLANTS

versus

SANT LAL—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 50—Hindu Law—Joint family—Decree against member—Execution of decree—Attachment of judgment-debtor's interest in joint family property—Death of judgment-debtor—Execution, whether can proceed against remaining members of family.

The attachment of the undivided interest of a coparcener in joint family property in execution of a decree creates a charge on such interest which is not extinguished by the subsequent death of the coparcener. [p. 292, col. 1.]

Suraj Bunsi Koer v. *Sheo Parsad Singh*, 5 C. 148; 6 I. A. 88, 4 Sar. P. C. J. 1; 3 Sath. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N.S.) 705 (P. C.) and *Lachmi Narain* v. *Kunji Lal*, 16 A. 449; A. W. N. (1894) 169; 8 Ind. Dec. (N. S.) 292, followed.

Respondent obtained a money-decree against one *A*, who was a member of a joint Hindu family along with his father, the appellant. In execution of his decree respondent attached the undivided share of *A* in the family house to the extent of half. After the attachment but before the sale *A* died and the respondent wanted to proceed with the execution against the attached property in the hands of the father :

Held, (1) that the attachment of *A*'s interest in the family house created a charge in favour of the respondent which was not extinguished by *A*'s death ; [*ibid.*]

(2) that in respect of the equity of redemption of *A*'s share in the house over which the charge had been created by attachment, the appellant was the legal representative of *A* and that the execution of the decree could proceed against him. [*ibid.*]

Execution first appeal from a decree of the Subordinate Judge, Dehra Dun, dated the 5th August 1924.

Dr. *K. N. Katju*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This is an appeal by the judgment-debtors from an order passed in execution. Faqir Chand is the father and *Musammat* Srimati the widow of one Amir Chand against whom the respondent had obtained a money-decree in execution of which he attached his undivided share in the family house to the extent of half. After the attachment but before the sale Amir Chand died and the decree-holder wanted to proceed with the execution against the attached property in the hands of the father and the widow. Objections were raised on behalf of the father which have been disallowed, hence this appeal.

Two points have been urged before us. The first is that the effect of the attachment ceased as soon as Amir Chand died inasmuch as the property was undivided joint family property which has survived to the father. The second point is that the father is in no case the legal representative of the deceased Amir Chand.

The first contention is contrary to what was laid down by their Lordships of the Privy Council in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), where it was clearly held that the attachment of an undivided interest of a co-parcener created a charge on his interest which was not extinguished by the death of that co-parcener. That case has been followed by this Court in the case of *Lachmi Narain* v. *Kunji Lal* (2).

As to the second point we think that, too, has no force. If by attachment the decree-holder had created a charge on the interest of the deceased Amir Chand the equity of redemption must vest in the father who is a surviving member. If for any reason the attachment were to cease the property would vest in the father. Under these circumstances Faqir Chand the father was the legal representative against whom execution ought to proceed. By way of precaution the learned Subordinate Judge has also impleaded *Musammat* Srimati the widow in case she wanted to file objections. This she need not do. Under these circumstances the order passed cannot be said to be in any way wrong. The appeal is dismissed with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 16 A. 449; A. W. N. (1894) 169; 8 Ind. Dec. (N. S.) 292.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 72 OF 1924.

November 17, 1924.

Present:—Mr. Justice Zafar Ali.

Musammat VIDYA VANTI—PETITIONER

versus

JAI DIAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—Leave to appeal as pauper, when can be granted—Decree not contrary to law, effect of.

Leave to appeal as a pauper cannot be granted to an appellant unless the decree appealed from appears to be contrary to law or to some usage having the force of law or to be erroneous or unjust.

Application for leave to appeal in *forma pauperis*.

Dr. *Nand Lal*, for the Petitioner.

Lala *Fakir Chand*, for the Respondent.

ORDER.—This is an application for leave to appeal in *forma pauperis*. The applicant is a Hindu lady whose husband and father-in-law are alive. Her suit was to recover Rs. 8,000 and the Court-fee leviable on this amount was duly paid by her in the Trial Court. Therefore, that Court was ordered to make an enquiry and report whether she was unable to pay the Court-fee required for the memorandum of appeal.* The report now received is that she is a pauper, but the enquiry brought to light the fact that she possesses bangles of gold which she did not produce, nor mentioned the same in the list of her property filed with the application. The lower Court thought that she could not part with the bangles because a woman whose husband is alive must wear bangles but the bangles that she must wear need not be of gold. As she did not mention the bangles at all it appears that her statement that she possessed no property other than that stated in the list was not true.

Under these circumstances I find that she has failed to establish that she is a pauper. But even if it were conceded that she is, the decree appealed from does not appear to be contrary to law or to some usage having the force of law or otherwise erroneous or unjust. I, therefore, reject the application but allow the petitioner one month's time from to-day within which she can pay up the necessary Court-fee.

Z. K. *Application rejected.*

*See 80 Ind. Cas. 649—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 125 OF 1924.

February 27, 1925.

Present:—Mr. Baker, J. C.

LAXMANRAO—PLAINTIFF—APPELLANT

versus

SADASHEO—DEFENDANT—RESPONDENT.

C. P. Land Revenue Act (II of 1917), ss. 159 220—Land Revenue in respect of sir *field, non-payment of—*Lambardar, *remedy of—Civil suit, whether maintainable.*

A suit by a *lambardar* of a village to recover from the defendant the amount of land revenue payable in

respect of a *sir* field leased to the defendant is barred under s. 220 of the C. P. Land Revenue Act. [p. 293, col. 1]

Such a suit would be maintainable where on an application under s. 159 of the C. P. Land Revenue Act, the Deputy Commissioner has assessed a proportionate share of the land revenue of the village on the land. [p. 294, col. 1.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 19th January 1924, in Civil Appeal No. 67 of 1923.

Mr. *R. N. Padhye*, for the Appellant.

Messrs. *M. Gupta* and *S. R. Mangrulkar*, for the Respondent.

JUDGMENT.—The facts of this case are that the plaintiff-appellant was up till 1919 a 12-annas co-sharer of Borgaon and defendant owned a 4-annas share in the same village, including a *sir* field No. 23. In 1919 defendant sold his 4-annas share to the plaintiff, who thus became possessed of the whole 16-annas, and by an agreement defendant leased the *sir* field to plaintiff in perpetuity for a premium of Rs. 400. Plaintiff as *lambardar* had to pay land revenue to Government on the whole village including the *sir* field in question, and the present suit is brought to recover from defendant the assessment on this field.

The defendant pleaded that it was agreed between himself and plaintiff that the assessment was to be paid by plaintiff, but this contention has been decided against him by both the Courts below. The First Court awarded plaintiff's claim, but on appeal the Additional District Judge, Nagpur, dismissed the suit, holding that under s. 220, cl. (*o*) of the C P. Land Revenue Act, the Civil Court had no jurisdiction to try the suit.

Plaintiff makes this second appeal and the sole question in appeal is whether the Civil Court has jurisdiction to try a suit by a proprietor to recover land revenue from a person who has not paid it.

Although there are one or two rulings on this point under the old Land Revenue Act, there do not appear to be any under the new.

Section 220, cl. (*o*) of the present C. P. Land Revenue Act of 1917 bars the jurisdiction of the Civil Court in respect to "distribution of the land or apportionment of the land-revenue or sums payable under a sub-settlement of a *mahal* or *patti* by partition or otherwise or the determination of the rent to be paid by a co-sharer for land held by him after the partition in the *mahal* or the *patti* of another co-sharer."

It is contended that there is no question in this case of a sub settlement or partition and that the section does not refer to a plot of land which is the question in the present case. The appellant relies on *Janki Prasad* v. *Blamukund* (1), *Daryao* v. *Tukarm* (2) and *Chaturbhuj* v. *Chandirmool* (3). These are all cases under the old Land Revenue Act and s. 152 of that Act is referred to in them.

From the statement of objects and reasons it appears that the new Act (s. 220) was designed to bar the jurisdiction of the Civil Courts, as s. 152 had failed to do so sufficiently. In *Janki Prasad* v. *Balmukund* (1), the suit was for arrears of revenue due by the defendants who while proprietors of the other *mahal* owned certain land in the plaintiff's *mahal* and it was held that this was a suit for apportionment of revenue already assessed.

It has been pointed out on behalf of the respondent that the rental value of the whole village including the land in suit has been fixed and of this a certain proportion is payable by the *malguzar* as land revenue to Government. But while the rental value of the *sir* land in dispute has been fixed, the assessment on it has never been separately fixed and the present suit for arrears of assessment necessarily involves the fixing of the assessment on this land, that is its apportionment, which is expressly excluded from the jurisdiction of the Civil Courts by s. 220, cl. (*o*) of the present Act.

The matter is made clear by s. 159 of the present Act which recognizes the right of the proprietor to recover land revenue in respect of any land which having been taken into account in the assessment of such estate or *mahal*, is held by any person without payment or on payment of any sum less than the land revenue payable thereon. Clause (3) of that section lays down that if land revenue has not been separately assessed on such land, the proprietor may apply to the Deputy Commissioner who shall assess thereon a proportionate share of the land revenue assessed on such estate or *mahal*, and such

(1) 14 C. P. L. R. 107.
(2) 1 N. L. R. 100.
(3) 5 Ind. Cas. 705; 6 N. L. R. 27.

land revenue shall thereupon become payable.

This appears to me to exactly cover the present case.

Admittedly the land in suit has been taken into account in the assessment of the village, that is its rental has been taken into account in arriving at the total rental value of the village on which the land revenue payable to Government is based. It is not the case that land revenue has been separately assessed on this land. Defendant claims to hold the land without payment of assessment on the strength of an agreement which he has not proved and which would also appear to be barred by the provisions of this section. The proper course, therefore, for the proprietor is to apply to the Deputy Commissioner to assess a proportionate share of the land revenue of the village on this land, and the plaintiff will then be entitled to recover it.

It is clear that the present suit involves the Civil Court performing the function which by s. 159 (3) is specially imposed on the Deputy Commissioner, *viz.*, assessing a proportionate share of the land revenue of the village on the land in dispute, for the plaintiff cannot get a decree unless and until the Civil Court determines what is the assessment on the *sir* land in dispute, that is apportionment of the land revenue, and apart from the provisions of cl. (*o*) of s. 220, the jurisdiction is barred by the first part of the section which says that no Civil Court shall entertain any suit to obtain a decision on any matter which any Revenue Officer is by this Act empowered to determine.

As shown above by s. 159 of the Act, the Deputy Commissioner is specially empowered to determine such a question as the assessment of a particular piece of land included in a village.

The view of the lower Appellate Court that the Civil Court has no jurisdiction to entertain the suit, is, therefore, right and the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 162 OF 1924.

January 28, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Le Rossignol.

NAND LAL—PLAINTIFF—APPELLANT

versus

AKKI AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 75—Instalment bond, suit on—Limitation, commencement of—Date of default—Part payment, effect of.

The purport of s. 20 of the Limitation Act is that where part of the principal of a debt is paid before the expiration of the prescribed period, that is, the period prescribed in the relative Article of Sch. I to the Act, and the fact of such payment is recorded in the handwriting of the person making the same, a fresh period of limitation shall be calculated from the time when the payment is made.

A suit to recover money due under an instalment bond is governed by Art. 75 of Sch. I to the Limitation Act and limitation begins to run from the date of the default; in other words not on the date of the payment but the date of the non-payment in accordance with stipulations of the contract. If in such a suit the plaintiff is able to prove the default, limitation runs from that date, and if his suit is within time from that date he has no need to refer to s. 20 of the Act.

Letters Patent Appeal from the judgment of Mr. Justice Broadway, dated the 8th February 1924.

Lala *Badri Das*, for the Appellant.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This Appeal arises out of an action to recover money on a bond payable by instalments with the *proviso* that default in payment of one or more instalments shall render the whole debt due forthwith. The plaint recited the payment of the first two instalments and a default on the third. It is common ground that the suit is within time if the first two instalments were really paid and the learned District Judge, whose finding of fact is conclusive, has found that the first two instalments were paid.

In appeal to this Court Mr. Justice Broadway has held on the authority of *Jawand Lal* v. *Sharf Din* (1) that s. 20 of the Limitation Act bars the proof by oral evidence of the payment of first two instalments and has dismissed the suit.

We may say at once that, in our opinion, s. 20 of the Limitation Act has no concern with this case. The ruling in *Jawand*

(1) 16 Ind. Cas. 961; 35 P. R. 1913; 4 P. L. R. 1913; 277 P. W. R. 1913.

Lal v. *Sharf Din* (1), we regret we are unable to follow. The Article of the Limitation Act governing a suit of this type is No. 75 and the *terminus a quo* provided by the Article is the date of the default; in other words, not the date of payment, but the date of non payment in accordance with the stipulations of the contract. If the plaintiff is able to prove the default limitation runs from that date, and, if his suit is within time from that date, he has no need to refer to s. 20 of the Act. Now the purport of s. 20 of the Act is that where part of the principal of a debt is paid before the expiration of the prescribed period, that is, the period prescribed in the relevant Article; and the fact of such payment is recorded in the handwriting of the person making the same, a fresh period of limitation shall be calculated from the time when the payment was made. The plaintiff in this case, however, does not ask that a fresh period of limitation shall be computed from the date of any payment. His action is within time from the date of the default which he has proved. Consequently he has no necessity to have recourse to the provisions of s. 20. He does not claim a fresh period of limitation from the date of the payment of the second instalment. He is satisfied with the limitation provided in Art. 75 which prescribes three years from the date of the default, and, as he does not invoke the aid of s. 20, he may prove the payment of the earlier instalments by the usual evidence.

For these reasons we accept the appeal and restore the District Judge's order of remand. Costs in the High Court shall follow the final result of the suit.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 648 OF 1923.

April 15, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

RAM BARAN CHAUBE AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

BHAGWATI PANDEY AND OTHERS —DEFENDANTS—RESPONDENTS.

***Civil Procedure Code** (Act V of 1908), O. XLVII, rr. 1, 2—Review, application for—Forum, proper—Mortgage—Prior and subsequent mortgagees—Equity of redemption purchased by prior mortgagee—Redemption, right of, exercise of—Procedure.*

The effect of rr. 1 and 2 of O. XLVII of the C. P. C. is that except in the cases specifically mentioned in r. 2, an application for review of judgment must be made not only to the Court which passed the decree or order but also to the Judge who passed the decree or order. An application for review of judgment made to a Judge who passed the judgment but who has ceased to preside over the Court in which the judgment was passed is not competent. [p. 297, col. 1.]

The language of rr. 1 and 2 of O. XLVII of the C. P. C. and particularly the nature of the cases included and excepted by particular mention in those rules puts it beyond doubt that the Legislature carefully considered the cases for which it was providing and that the consideration was not absent from its mind that in certain cases there may be no Judge at all to whom an application for review may be made. [*ibid.*]

Where the equity of redemption of certain mortgaged property happens to become vested by purchase in a person who is also a prior mortgagee of the property and that person as owner of the equity of redemption wants to redeem a puisne-mortgage, while at the same time the puisne-mortgagee wants to redeem the prior mortgage, the claim of the former not as prior mortgagee but as owner of the equity of redemption must be preferred. [p. 297, col. 2; p. 298, col. 1.]

Second appeal from a decree of the Additional Judge, Gorakhpur, dated the 31st January 1922.

Dr. *S. N. Sen*, for the Appellants.

Mr. *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal. It was a suit for a declaration of title that the plaintiff was a mortgagee in possession of plot No. 118 and that he was not a tenant of the defendants and he also prayed for redemption of two simple mortgages. It appears that the original owners were Dharam Dut and Aman Dut whose heirs were defendants Nos. 10 to 16. A simple mortgage was executed by Dharam Dut and Aman Dut in February 1876 in favour of one Debi Dayal whose heirs were represented by defendants Nos. 1 to 8. A second mortgage similar in all respects was executed on the 25th of September 1876. Finally Dharam Dut and Aman Dut executed in favour of one Pabaru Sunar a usufructuary mortgage on the 22nd of May 1879. The grandson of Pabaru Sunar, Ram Nath, who was really a *pro froma* defendant 3rd party sold his rights on the 7th of August 1909 to Ram Baran Chaube and Hazari Chaube the present plaintiffs, and gave possession. On the 17th of April 1888 the heirs of Debi Dayal, the prior mortgagees, obtained a decree in respect of their

two simple mortgages but did not in their suit make the usufructuary mortgagee, the predecessor of the plaintiff, party. Having obtained a decree for sale the heirs of Debi Dayal whom we shall henceforward call the defendants themselves purchased the mortgaged property. In 1921 they sued in the Revenue Court to eject the present plaintiff describing him as a tenant and on the 4th of March 1921 the plaintiff objected that he was really a mortgagee and he was referred by the Revenue Court to the Civil Courts. He duly went to the Civil Court and the present proceeding is the result. The defendants pleaded that they, not in their capacity as prior mortgagees but by right of their purchase of the equity of redemption at the auction-sale, were entitled to redeem the plaintiff. They pleaded that they had obtained decrees which extinguished their own mortgages and, therefore, no suit by the plaintiff for redemption was possible.

The Trial Court, the Munsif, (Babu Girish Chander) on the 16th of February 1922 granted a preliminary decree for redemption to the plaintiff on the basis that all accounts should be taken as to what was due to the defendants on their mortgages at the date of the acution-purchase. Subsequent to the passing of this preliminary decree Babu Girish Chander was transferred to another Court to act as Subordinate Judge in the same district. On the 16th of February 1922 he had written the judgment in the case but his successor, Babu Raghu Nath Prasad, on the same day, the 16th of February 1922, pronounced it The next step was an application by the plaintiff on the 18th of February 1922 to the Court of the Subordinate Judge which was then presided over by Babu Girish Chander to amend his judgment so that the decree should read that the account should be taken up to the date of the decree obtained by the defendants in accordance with the Privy Council ruling to that effect. It would appear that on the 4th of March 1922 the defendants appealed from the original preliminary decree to the Court of the District Judge. On the same day Babu Girish Chander allowed the application for review and passed a fresh decree. It is clear that though these two proceedings took place on the same date the appeal of the defendants was in fact filed before the order allowing the review was passed for there is a reference to it in the order granting the review. On the 22nd April 1922 the defendants also appealed against the order allowing the amendment. The two appeals were heard together by the District Judge. He dismissed the plaintiff's suit for redemption holding that the defendants' mortgages had ceased to exist as a consequence of the decrees obtained by them and he held that the defendants were entitled to redeem the plaintiff. The plaintiff at the hearing of the appeal objected unsuccessfully that the appeal should have been against the preliminary decree as passed by the Subordinate Judge Babu Girish Chander, an appeal against which was barred by time. The District Judge further held the order of Babu Girish Chander allowing the review to be without jurisdiction and the District Judge gave to the defendants a decree allowing them to redeem the plaintiff's mortgage on payment of Rs. 85.

The plaintiffs have now applied to this Court in Revision No. 65 of 1923 against the order of the District Judge by which he held that Babu Girish Chander had no jurisdiction and in the S. A. No. 648 of 1923 against the order by which he reversed the decree of the Munsif and gave the defendants' right to redeem.

It will be convenient to dispose of both matters in the same order.

As to the Revision No. 65 of 1923, it is again contended before us that the appeal of the defendants should have been directed against the preliminary decree as amended by Babu Girish Chander after he had ceased to be Munsif. To establish this contention it is necessary for the plaintiff to contend, and it has been contended with much verbal play on the wording of rr. 1 and 2 of O. XLVII, that the plaintiff was right in making to Babu Girish Chander his application for review and that Babu Girish Chander had power to entertain it. It is not necessary to follow Counsel for the applicant in revision in the ramifications of his argument on this point. It is clear on the face of r. 1 that an application for review must in all the cases in which it is allowed at all be made "to the Court which passed the decree (or made the order)". If this r. 1 stood alone, then all such applications could be made to "the Court which passed the decree" whether the Judge presiding in that Court was the Judge who passed the decree or was a successor of that Judge. But r. 1 is followed by r. 2 which adds a further condition that ex-

cept in certain cases of which the case before us is not one, the application must be made "only to the Judge who passed the decree." In the cases excepted the application must be made to the Judge who is presiding at the time in "the Court which passed the decree" and may be made to him whether he is the same Judge who passed the decree or the successor of such Judge, such cases being excepted from r. 2 and only controlled by r. 1. In other cases than those excepted (and the present case is not one of those excepted) r. 2 declares that the application can only be made to the Judge who is not only as required by r. 1 sitting as the same Court but is further the individual Judge who passed the decree.

In other words r. 2 imposes in certain cases, of which this is one, a second condition in addition to that imposed by r. 1. In the present case owing to transfer of Babu Girish Chander there was no Judge who fulfilled both conditions. Babu Girish Chander was not sitting as the same "Court" and his successor Babu Raghunath Prasad was not the same "Judge." The plaintiff should, therefore, have proceeded to his remedy by way of appeal.

The fact that under certain circumstances there may be, through no fault or act of the intending applicant, no Judge at all to whom application for review can be made as in the present case or where the individual Judge has died, would at first sight suggest a different interpretation of the section. This difficulty was incidently noticed in *Maharajah Moheshur Sing* v. *Bengal Government* (1).

But, in our opinion, the terms of rr. 1 and 2 and particularly the nature of the cases included and excepted by particular mention in those rules puts it beyond doubt that the Legislature carefully considered the cases for which it was providing and that the consideration was not absent from its mind that in certain cases there might be no Judge at all to whom application could be made. Be that however as it may be, and though the rules might have been more clearly worded, the effect of them is beyond doubt.

This is the only argument that was seriously pressed before us in this connection and there is clearly no force in it.

We hold, therefore, that the learned Additional District Judge was clearly right in holding that Babu Girish Chander had no jurisdiction to allow the review.

The application in revision is dismissed with costs including fees on the higher scale.

Next as to the S. A. No. 648 of 1923. It is urged that the prior mortgagee filed his suits and got his decrees without making the plaintiff puisne-mortgagee a party to his suit, and then himself purchased deliberately with the intention of depriving the puisne-mortgagee of his right to redeem. This may be so, but how does it help the plaintiff? If, to mark our disapproval, the plaintiff were given the right to redeem which he claims, that would he gain thereby? The prior mortgagee has by his purchase of the mortgagor's rights secured the right to redeem the mortgage of the plaintiff, and if the plaintiff redeemed his mortgages, he would be able immediately in turn to redeem the plaintiff's mortgage. The case is in all essentials indistinguishable from that reported as *Parasram Sing* v. *Pandohi* (2). We find ourselves in complete agreement with that decision and the reasoning to be found therein. Some attempt was made by Counsel for the appellant to distinguish that case on two grounds, firstly, that in that case the prior mortgagee who had become the owner of the equity of redemption had made a deposit under s. 83 of the Transfer of Property Act; and, secondly, that he had in his written statement put forward his claim to redeem. Neither argument has any force in face of the written statement in this case, in para. 10 of which the defendant declared himself ready to pay and in para. 9 of which he asserted his right to redeem. The case was opened to us with the suggestion that it had been held that a prior mortgagee has a right to redeem. Of course neither in the decision in *Parasram Sing* v. *Pandohi* (2) was this really held, nor do we hold it in this case, but merely that where the mortgagor's equity of redemption happens to have vested by purchase in a person who is also a prior mortgagee and that person as owner of the equity of redemption wants to redeem a puisne-mortgage while at the same time the puisne-mortgagee wants to redeem the prior mortgage, the claim of the former not as prior mortgagee but as owner of

(1) 7 M. I. A. 283 at p. 304; 3 W. R. P. C. 45; 1 Suth. P. C. J. 325; 1 Sar. P. C. J. 645; 19 E. R. 316.

(2) 67 Ind. Cas. 533; 20 A. L. J. 491; (1922) A. I. R. (A.) 135; 44 A. 462; 4 U. P. L. R. (A.) 145.

the equity of redemption will be preferred. There is no more force in the appeal than in the revision and we dismiss it accordingly with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 111 OF 1924.

February 5, 1925.

Present:—Justice Sir Henry Scott-Smith, Kt., and Mr. Justice Martineau.

CHAJJU RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SINGH RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Suit for declaration that decree cannot be executed—Defendants, some, not made parties to appeal—Appeal, whether can proceed.

A joint decree was passed in favour of the defendants against the plaintiffs and the latter brought a suit for a declaration that the decree could not be executed against them. In appeal some of the defendants were not impleaded as respondents:

Held, that all the defendants were necessary parties to the appeal and that the appeal could not proceed in the absence of some of them.

Letters Patent Appeal from an order of Mr. Justice Le Rossignol, dated 27th February 1924.

Mr. *Manohar Lal*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—Bhiku and Situ, defendants, who were parties to the appeal before the Judge in Chambers have not been made respondents in this Letters Patent Appeal.

They and their two brothers, Singh Ram and Abhe, have a joint decree against the plaintiffs-appellants who seek a declaration that that decree cannot be executed.

Bhiku and Situ were necessary parties to this appeal and a preliminary objection is raised that the appeal cannot proceed without their being made parties. We are referred to *Khaira* v. *Salem Kaj* (1) and are asked to dismiss the appeal. Mr. Manohar Lal admits that the appeal cannot proceed and we accordingly dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 51 Ind. Cas. 935; 1 L. 21.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1756 AND 1757 OF 1922.

May 8, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

BISWAMBHAR DAS BORAL—PLAINTIFF—APPELLANT

versus

AMIRUDDIN MONDAL—DEFENDANT—RESPONDENT.

Construction of document—Lease for indefinite period, duration of.

A lease for an indefinite period granted for purposes of cultivation and for letting out the lands to tenants, enures for the lifetime of the grantee.

If a grant be made to a man for an indefinite period it enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are same words showing an intention to grant an hereditary interest.

Appeal against the decrees of the Additional District Judge, Dinajpur, dated the 27th April 1922, affirming those of the Munsif, Second Court, at that place, dated the 22nd of August 1921.

Dr. *N. N. Mitter* (with him Babu *Sarat Kumar Mitter*), for the Appellant.

Dr. *S. C. Basak* (with him Babu *Bimal Chandra Das Gupta*), for the Respondent.

JUDGMENT.

Cuming, J.—These two appeals arise out of a suit to eject the defendant after giving him notice to quit. The facts are shortly these: The defendant held two leases one of 4-annas share in *Mouza* Chak Bhabani and the other of 8-annas share of *Mouza* Debagram. These two leases were granted to the defendant by the *zemindar* of the village in 1300 *B. S.* The plaintiff got from the *zemindar* a *patni* lease of 16-annas share of these two villages in 1305 and 1306. In 1311, the plaintiff served the notice to quit on the defendant. The defendant disregarded this notice to quit and apparently the plaintiff took no further steps. Notice was again issued on the defendant but with similar result; and hence this suit.

The case of the defendant was that he got two permanent leases of the land in question. Both the Trial Court and the lower Appellate Court held that the defendant had a lease for life of the properties in question and, therefore, the plaintiff was not entitled to eject him.

The plaintiff has appealed and cross-objections have been filed by the respondent. The whole case turns on the construction of the leases granted by the

zemindar. In these leases no term is stated. They are leases for the purposes of cultivation and for letting out the lands to tenants. No terms being specified in these leases, they may be taken to be leases that would enure for the lifetime of the grantee. In the case of *Lekhraj Roy* v. *Kunhya Singh* (1), their Lordships of the Privy Council observe as follows:—"If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest." These leases in question are for an indefinite period and the lower Courts have rightly construed them as being for the lifetime of the grantee. In this view of the case I am not prepared to disagree with the finding of the lower Appellate Court. The appeal fails and is, therefore, dismissed with costs.

The cross-objections on behalf of the respondent have not been pressed and are dismissed without costs.

This judgment governs Appeal No. 1757 of 1922 which is also dismissed with costs.

Chakravarti, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 3 C. 210; 4 I. A. 223; 3 Suth. P. C. J. 453; 3 Sar. P. C. J. 758; 1 Ind. Jur. 636; 1 Ind. Dec. (N. S.) 722 (P. C.).

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 34 OF 1924.

January 21, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

BELA SINGH—PLAINTIFF—APPELLANT

versus

LAKSHMI DAS—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Notice of ejectment—Title suit, dismissal of—Execution of order—Formal delivery of possession—Fresh notice, effect of—Suit for declaration—Limitation, commencement of—Takarraridar, *whether entitled to eject owner.*

A *takarraridar* who has no right in the land except that of securing a share of the produce, is not entitled to eject the owner of the land from possession of the land

Defendant issued a notice of ejectment to the plaintiff, and the plaintiff brought a suit in the Revenue Court to contest the notice of ejectment but was defeated. The proceedings in execution of the order of ejectment were purely formal and plaintiff's possession was not disturbed. Subsequently defendant issued a fresh notice of ejectment upon the plaintiff and plaintiff brought a suit against the defendant for a declaration that he was not liable to ejectment:

Held, that under the circumstances of the case the issue of the second notice of ejectment constituted a fresh invasion of the plaintiff's title and he was entitled to base his suit upon that fresh invasion and that limitation began to run from the date of the second notice of ejectment.

Letters Patent Appeal from the judgment of Mr. Justice Harrison, dated the 18th January 1924.

Mr. *C. H. Oertal*, for the Appellant.

Mr. *Rama Nand* for Mr. *Gobind Ram*, for the Respondent.

JUDGMENT.—The plaintiff in this case is shown in the Revenue Records as the owner of the land in suit, whilst the defendant is shown as a *takarraridar* entitled to a $\frac{1}{3}$rd share of the produce, and there is no doubt that the plaintiff is the owner and that the defendant is a *takarraridar* with no interest in the land except the right to a $\frac{1}{3}$rd share of the produce. The status of a *takarraridar* is not clearly defined, but in this case he appears to be the successor-in-interest of a *muafidar* whose *muafi* lapsed and on its lapse the ex-*muafidar* was granted the right to a $\frac{1}{3}$rd share of the produce of the land with the title of *takarraridar*.

The cause of action in the present case was the issue by the *takarraridar* to the plaintiff of a notice of ejectment, and the learned Judge in Chambers has dismissed the suit on the ground that in 1912 the plaintiff was ejected from the land in suit. The facts are as follows:—

The defendant issued a notice of ejectment in 1912 to the plaintiff. The plaintiff brought a suit in the Revenue Court to contest the notice of ejectment but was defeated. Thereupon proceedings in execution of the notice took place; but the proceedings were purely formal, and in fact the plaintiff retained physical possession of the land in suit. In other words, so far as the plaintiff was concerned the ejectment proceedings of 1912 in no way affected his possession and, as his physical possession was not affected, he was entitled to ignore those proceedings. Now, that a further notice of ejectment has been issued against him, that constitutes a fresh invasion of his title, and he is consequently within his right in basing his present suit upon that fresh notice. We, therefore, hold

that his suit was within time, and as the facts of the case are perfectly clear, namely, that the plaintiff is the owner of the land and the defendant is a mere *takarraridar* with no right in the land except that of securing a share of the produce, we accept the appeal and restore the decree of the District Judge with costs in the High Court.

Z. K. *Appeal accepted.*

RANGOON HIGH COURT.

CIVIL REVISION NOS. 134 AND 177 OF 1924.

December 8, 1924.

Present :—Mr. Justice Godfrey.

N. K. R. R. M. CHETTY FIRM—

PETITIONERS

versus

M. SUBRAYA MUDALIAR—

RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 115, O. XXI, rr. 83, 89, 90, 91, 92—Execution of decree—Sale, application to postpone, refusal of—Sale carried out—Appeal—Revision—Application to set aside sale, absence of—Confirmation of sale—Duty of Court.

Where no application is made under rr. 89, 90 or 91 of the C. P. C. to set aside an auction-sale, the Court has no alternative but to confirm the sale. Where a judgment-debtor's application to postpone an auction-sale is rejected under O. XXI, r. 83 of the C. P. C., and the sale is subsequently held, the remedy of the judgment-debtor is to make an application to set aside the sale under r. 89 or r. 90 of O. XXI, or to apply in revision to the High Court under s. 115 of the Code to have the proceedings of the Execution Court set aside upon the ground that the postponement of the sale had been improperly and illegally refused and not in proper exercise of the judicial discretion vested in the Court. The sale having once been held it is not open to the judgment-debtor to appeal against the order refusing to postpone the sale. [p. 302, col. 1.]

Civil revision against the decrees of the District Court, Insein, in Civil Miscellaneous Appeals Nos. 23 and 56 of 1924.

Mr. *P. B. Sen*, for the Petitioners.

Mr. *Hay*, for the Respondent.

JUDGMENT.—These are applications in revision against two orders passed by the District Court, Insein, the one of the 5th May, 1924 postponing the confirmation of the sale of certain property sold in execution of a decree at the instance of the present applicants, and the other of 14th June 1924 dismissing the applicants' appeal against the order of the Sub-Divisional Court declining to confirm this sale in conformity with the District Court's order before referred to, upon an application previously filed by the applicants in that behalf. They arise out of the same execution proceedings and are accordingly disposed of together.

It appears that on the 7th September 1922, the applicants obtaind a money decree against the respondent for some Rs. 3,600 odd and in execution attached on the 26th January 1923 certain immoveable property belonging to the respondent, which was already mortgaged to the applicants. For a variety of reasons, and several times upon grounds put forward by the respondent which have been characterised by the District Court as obstructive, the sale of the property was delayed until January 1924, when on the 8th of that month a final sale proclamation was issued by the Sub-Divisional Court for the holding of the sale subject to the mortgage on the 16th February. Before that date, however, the respondent filed applications representing that the land had been acquired by Government. This was not quite accurate as it seems that, though land acquisition proceedings were pending, they were not, and have not even yet terminated. The Sub-Divisional Court, however, took notice of the fact and directed that the information should also be published in the sale proclamation for the benefit of intending bidders. The respondent then applied on the 15th February 1924 suggesting that the sale should be stayed, but if it was to take place, asking that it might be advertised in the *Rangoon Gazette*. Upon this the Sub-Divisional Court passed an order to the effect that there was no ground for further staying the sale, but it directed that the proclamation should be advertised as desired. The sale had in consequence to be postponed until the 15th March, 1924.

On the 14th March 1924 the respondent filed a further application definitely asking that the sale be postponed until he had received compensation from the Collector in the land acquisition proceedings. This application was rejected and the sale took place as advertised and the land was bought by the attaching creditors—the applicants—who had obtained leave to bid. The Court then fixed the 1st May 1924 for the confirmation of the sale.

On the 26th March, however, the respondent filed an appeal to the District Court, attaching the diary of the whole proceedings of the Sub-Divisional Court terminating in the last order fixing a date for the con-

firmation of the sale, and it is against the order then passed by the District Court that the first of the present application is made. The other application is subsidiary, and if this one is allowed, it follows that that should be too.

It is obvious that the sale having already taken place when that appeal was filed, no question of stay could possibly arise, and question as to whether an appeal did or did not lie against an order refusing to stay the sale are entirely beside the point. There can be no doubt that the proceedings of the Sub-Divisional Court above detailed have been perfectly regular, and it is difficult to see how there was, in fact, any real ground in the circumstances for directing a stay of the sale. The land acquisition proceedings are still pending and it is not yet known whether the land will be acquired or not. A great deal has been made of the hardship likely to ensue upon the judgment-debtor (respondent), if the price awarded by the Collector is a large one, as he will not get the benefit. But this argument proceeds upon the assumption that the property is worth a very large sum of money, and has been sold for a song, and also ignores the fact that the inclusion of the information regarding the pending acquisition proceedings in the proclamation of sale can hardly have lessened the attractiveness of the purchase, and of this the judgment-debtor get does the benefit. Though it is stated by the judgment-debtor (respondent) that the property is worth something like Rs. 60,000, there is no proof of this, and the judgment-creditor in his application for execution only places its value at Rs. 20,000. The complaint that it was sold for Rs. 3,200 entirely ignores the fact that it was sold in execution of a decree for over that amount and also subject to a mortgage for Rs. 12,000 with accumulating interest. If the property had indeed been so very much more valuable, it is inconceiveable that the judgment-debtor would not have applied earlier for stay of execution and of the sale upon proper grounds and have raised the money to pay off his pressing creditor. What he did do was to wait until the very last moment—the day before the sale—and it was then only that he definitely applied on this ground for the postponement of the sale. For two or three months he had known of the land acquisition proceedings; but did not apply. And it would seem that there were some grounds for the Sub-Divisional Court's thinking that his action was really dictated by the same obstruction, which had characterised his attitude throughout.

However, apart from the merits, the question now involved is whether the present order of the District Court postponing the coufirmation of the sale indefinitely can be sustained, or whether it is in fact illegal and made without jurisdiction, as it is contended. It has been contended that the present matter should come, before this Court by way of second appeal; but it would seem clear that it has been rightly classed as a revision application—*cf. Asimuddi Sheikh* v. *Sundari Bibee* (1).

The order of the Sub-Divisional Court refusing to postpone the sale was passed under O. XXI, r. 83, C. P. C., and was a matter resting in the discretion of the Court to be exercised in conformity with the provisions of sub-r. (1), which provides that "if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property..... the Court may, on his application, postpone the sale....." The judgment-debtor did not apply until the very last day. His previous application had not indicated any very serious objection to the sale being held, but had asked that it should be advertised in the *Rangoon Gazette*, which was duly done. Having delayed his application until the very last day, and that application having been refused, he allowed himself no time to move the lower Appellate Court in appeal against the order refusing postponement. And the sale having taken place, his only remedy then, it is clear, was to apply to have that sale set aside. Provision is made for such application in O. XXI, rr. 89, 90 and 91, C. P. C. No such application was, however, made by him to the Sub-Divisional Court; but instead he appealed to the District Court to set aside the sale. The District Court postponed the confirmation of it.

It is difficult to understand how the District Court in its appellate jurisdiction could have entertained by way of appeal an application, which should have been made to the Original Court, which is practically what it did. It being no longer

(1) 10 Ind. Cas. 345; 38 C. 339; 15 C. W. N. 844; 14 C. L. J. 224.

possible to effectively appeal against the order refusing to stay the sale, the sale having already taken place, and the respondent presumably not wishing to apply to the Original Court to set aside the sale under the provisions above referred to, which would probably have been ineffectual, his only possible complaint being on the ground that his application to stay the sale had been refused, it would seem that his proper remedy in the circumstances would have been to apply in revision to the High Court under s. 115, C. P. C., to have the proceedings of the Sub-Divisional Court including the sale, set aside upon the ground that the postponement of the sale had been improperly and illegally refused and not in proper exercise of the judicial discretion vested in that Court. The District Court has no such revisional powers, though it has in effect exercised them. But it seems to me that for still another reason the order of the District Court cannot be sustained. The order passed is an order contingent upon two events, neither of which has yet taken place, and is in the form of a sort of compromise. It postpones the confirmation of the sale, which in itself is a bad order in law, and provides that, if Government withdraws from the acquisition, the sale shall be confirmed, but if Government proceeds with the acquisition and an award is made, confirmation of the sale shall be refused.

Having treated the appeal as one arising on a question to be determined within s. 47 of the C. P. C., it is obvious that the order passed should have been one, which conclusively and finally determined (so far as that Court was concerned) the rights of the parties with regard to the matters in controversy. This it did not, but as previously stated a sort of compromise dependent upon certain contingencies. In my opinion the order cannot be sustained.

The other application before this Court is against the District Court's order confirming the order of the Sub-Divisional Court refusing to confirm the sale. Under O. XXI, r. 92 (1), C. P. C., where no application has been made under rr. 89, 90 and 91, the Court has no alternative but to confirm the sale and the applicants were entitled to the order they asked for. *Umesh Chandra Dass* v. *Shib Narain Mandal* (2).

Both these applications must, therefore, be allowed, the orders of the District Court complained of set aside and the proceedings returned to the Sub-Divisional Court for the order of confirmation to be passed according to law. The respondent will pay the applicants' costs—five gold *mohurs*.

Z. K. *Applications allowed.*

(2) 31 C. 1011 at p. 1013; 9 C. W. N. 193.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 136 OF 1924.

February 6, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

JAI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

DARBARA SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Alienation by male proprietor, suit to challenge—Sale of mortgaged property to provide capital for migration to another country, whether justified—Delay, effect of.

Where a suit is brought to challenge an alienation nearly twelve years after the date of the alienation, the case should not be decided on the narrow lines of an arithmetical enquiry. [p. 303, col. 1.]

Where a person against whose character nothing is suggested and who has long been out of possession of his estate, which for years past has been in the possession of mortgagees for a very large sum, makes up his mind to raise, by selling all that remains of his rights, a sum of money which would provide him with a small capital to enable him to migrate to another country, he is perfectly entitled to do so, and his act is an act of prudence and good management. He is not obliged to nurse his estate for the advantage of his reversioners. [*ibid.*]

Letters Patent Appeal from the judgment of Mr. Justice Campbell, dated the 28th April 1924.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *B. A. Cooper*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Jai Singh sold the ancestral property in suit for Rs. 4,000 on the 3rd of March 1910, and the present appeal arises out of a suit brought in January 1921, by a brother and nephew of Jai Singh for a declaration that the sale should not affect their reversionary rights.

The first two Courts dismissed the suit, holding that Rs. 3,000 out of the Rs. 4,000 were absolutely proved to be necessary. With regard to the remaining sum of Rs. 1,000 which was paid in cash before the Sub-Registrar by the vendee to the vendor, the First Court held that after the

lapse of such a long period the vendee could not be expected to give strict proof of necessity. It noted that an attempt had been made to prove that the vendor required money for the *karewa* of his son and for his journey to China. for it is an undisputed fact that the vendor and his family have left India

The First Court of Appeal took the same view. Although it held that the expenditure on emigration to China was not a necessity, it seems to have accepted the suggestion that Rs. 600 were spent on the vendor's son's marriage and Rs. 400 in travelling expenses.

On second appeal the learned Judge in Chambers has held that necessity for only Rs. 3,000 out of the sale price has been established and has converted the sale into a charge which plaintiffs will have to pay before taking possession of the land when succession opens out to them. The learned Judge considered that there was no proof that the vendor's son had ever been married or that Rs. 1,000 had been advanced by the vendee on the representation that money was required by the vendor for his son's marriage.

From his judgment this Letters Patent Appeal has been preferred and we think it should succeed. Cases such as these should not, in our opinion, be decided on the narrow lines of an arithmetical enquiry when the plaintiff comes into Court at such a late hour. It must be very difficult for a vendee to remember after so many years what precisely were the representations made to him by the vendor to induce him to accept the sale. The facts are clear. The vendor had long been out of possession of his estate which for years past had been in the possession of mortgagees for a very large sum. Nothing is suggested against his character, and if he made up his mind to raise, by selling what remained of his rights, some sum which would provide him with a small capital to enable him to migrate to another country, we hold that he was perfectly entitled to do so, that his act was an act of prudence and good management, and that he was not obliged to nurse his estate for the advantage of his reversioners.

On the merits, there is little to be said for the plaintiffs; they remained silent for nearly 12 years and their suit is a speculative one, for between them and the succession there is the vendor's son who is still a young man and may have sons. If then the finding had been that the whole of this Rs. 1 000 had been raised by the vendor in order to provide him with a small capital in his new career and in order to defray the costs of the migration of himself and his family to China, we should have held the transaction to be one of prudence, good management, and necessity, but accepting the finding of fact that one-fourth of the sale price of Rs. 4,000 has not been proved to have been taken for necessity, we still think that the peculiar circumstances of the case justify the maintenance of the sale.

We accept the appeal and dismiss the suit with costs throughout.

Z. K. *Appeal accepted.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 184 OF 1924.

January 19, 1925.

Present:—Mr. Justice Pratt.

MAUNG KYAUK PU—PLAINTIFF—APPELLANT

versus

MAUNG PU—DEFENDANT—RESPONDENT.

Upper Burma Land Revenue Regulation (III of 1889), ss. 3, 23, 24, 25—Village land, whether State land—Bobabaing *land, whether can be owned in village—Collector, jurisdiction of, to decide dispute between rival claimants to State land—Ejectment order—Possession, suit for, maintainability of*

There is no authority for the proposition that all village land is State land. [p 304, col. 1.]

There is no reason why persons should not own *bobabaing* land in a village; and it is conceivable that *bobabaing* land might often exist in an area which was not originally appropriated to dwelling places but was subsequently so appropriated. [*ibid.*]

The Upper Burma Land Revenue Regulation does not authorize a Revenue Officer to decide a dispute between rival claimants to State land except within one year of a declaration that a land is State land. In the absence of proof that a land is State land a Collector's order deciding a dispute between rival claimants to it and ordering the ejectment of one of the parties from the land is *ultra vires* and the person ejected or his legal representative is entitled to maintain a suit to recover possession of the land on the basis of a title derived from long occupation. [p. 304, col. 2.]

Mr. *Mitter*, for the Appellant.

Mr. *Sanyal*, for the Respondent.

JUDGMENT.—Plaintiff sued to recover possession of a house site, which he alleged to be the *bobabaing* property of his father-in-law, Maung Ne Dun.

The Trial Court found that the land was the property of plaintiff's father-in-law and granted a decree as prayed.

On appeal, the District Court pointed out that defendant was in possession with the permission of the Collector, and, assuming that the land was State land, his title as derived from the Collector must be deemed to be superior to that of plaintiff.

The learned District Judge based his finding that the land was State, on the fact that plaintiff by applying to the Collector for the land as village land had admitted that it was State.

Plaintiff's application to the Collector for the land cannot be construed as an admission that the land is State, and the Judge himself had pointed out earlier in his judgment that the Collector had given no authority for the proposition that all village land is State land. I know of no authority for such a sweeping proposition.

State land is defined in s. 23 of the Upper Burma Land Revenue Regulation and village land is not referred to in the section. Village is defined in s. 3 as an area appropriated to dwelling places not included in a town.

There seems to be no reason why persons should not own *bobabaing* land in a village; and it is conceivable that *bobabaing* land might often exist in an area which was not originally appropriated to dwelling places, but was subsequently so appropriated.

It is not suggested that there has ever been any formal declaration that the land is State under s. 24.

Maung Ne Dun was ejected from the plot of land by the Deputy Commissioner in a village proceeding. He appealed to the Collector against his order on the general side, and the Collector sitting on the Revenue Side confirmed his own order, holding that the land was State.

The Collector has assumed that the land was State land on quite inadequate grounds and has evicted Maung Ne Dun purporting to act, it may be presumed, under s. 25 (*d*) of the Regulation. He has in effect decided a dispute between rival claimants to State land, which, it was definitely laid down by the Judicial Commissioner in similar circumstances in *Sonilal Sheoshankar* v. *Delawar* (1), the Revenue Regulation does not authorize Revenue Officers to do, except within one year of a declaration that a land is State. Even, therefore, if the land was State, on this ruling the Collector had no power to decide between rival claimants and eject one of them.

It appears from the terms of the Collector's order that Maung Ne Dun claimed that the land had been in possession of himself and his forefathers for a long period. This obviously amounted to a denial that the land was State, and there was no justification for the Collector's assumption that the land was State.

As a matter of fact the Collector did not decide that Maung Pu (the defendant) had a better title to the land than Maung Ne Dun, but gave it to him because he was more in need of it.

In the absence of proof that the land was State, I am of opinion that the Collector's order was *ultra vires* and that he had no right to eject Ne Dun from the land.

This is not, however, an appeal against the Collector's order and no appeal lies to the Civil Court. We are concerned merely with the merits of the rival claims between plaintiff and defendant. Plaintiff based his title on Maung Ne Dun's long possession and that of his forefathers.

As against plaintiff, defendant had no claim except that derived from the Collector's order, which, I have held, was under the circumstances *ultra vires*. His need of a house site gives him no right as against a title derived from long occupation.

I consider the District Court was wrong in reversing the order of the Trial Court on the merits.

I set aside the finding and decree of the District Court, and restore the decree of the Township Court with all costs.

Z. K. *Decree set aside.*

(1) 39 Ind. Cas. 367; 2 U. B. R. (1916) 151; 11 Bur. L. T. 42.

RANGOON HIGH COURT.

CRIMINAL REVISION NOS. 948 B AND 953-B OF 1924.

December 2, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Godfrey.

V. M. ABDUL RAHMAN AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 (1) (c), 196-A, 476—Penal Code (Act XLV of 1860), ss. 109, 120-B, 466—Conspiracy to do legal act by illegal means—Forgery, abetment of—Insolvency—Application for adjudication—Order directing prosecution—Complaint—Cognizance of case by Magistrate—Complaint or consent of Local Government, absence of, effect of—Jurisdiction, want of—Charges, alternative, framing of—Procedure.

Section 196-A of the Cr. P. C. applies only to a prosecution for conspiracy punishable under s. 120-B of the Penal Code and not for abetment of conspiracy punishable under s. 109 of the latter Code. [p. 308, col. 2.]

A and *M* entered into a conspiracy to injure a rival in business by getting him adjudicated insolvent. In pursuance of this conspiracy *A* and *M* procured the forgery of certain warrants for the attachment of immoveable property belonging to the rival. *M* thereafter filed an application against the rival to get him adjudicated an insolvent. After an enquiry by the Insolvency Court the application to adjudicate was dismissed and the Insolvency Court made a complaint against *A* and *M* charging them with an offence punishable under s. 120-B read with ss. 466 and 109 of the Penal Code. On this complaint the Magistrate, to whom the case was made over for disposal, framed charges against *A* and *M* under s. 120-B of the Penal Code. On appeal the High Court set aside the complaint so far as it related to *A* on the ground that the Insolvency Judge had no jurisdiction to lay a complaint against *A* who was no party to the insolvency proceedings before him. The Counsel for the complainant thereupon drafted and presented a complaint against *A* in the same terms as the one which had been laid by the Insolvency Judge. On this complaint the Magistrate took proceedings against *A* and a joint trial of both *A* and *M* proceeded. During the course of the trial objection was taken to the jurisdiction of the Magistrate to proceed against *A* in the absence of any complaint or consent such as was required by s. 196-A of the Cr. P. C. The Magistrate thereupon framed alternative charges under ss. 466 and 109 of the Penal Code against both accused:

Held, (1) that *A* not having been a party to the proceedings before the Insolvency Judge he was not a person who came within the purview of s. 195 (1) (c) of the Cr. P. C., and that, therefore, as regards him the proviso to sub-s. (2) of s. 196-A of the Code did not do away with the necessity for the sanction of the Local Government to the initiation of proceedings against him; [p. 307, col. 2.]

(2) that as regards *A*, therefore, the Magistrate had acted entirely without jurisdiction and the whole of the proceedings against him were void and illegal; [p. 308, col. 1.]

(3) that the Magistrate having acted without jurisdiction against *A* the defect in the proceedings could not be cured by framing an alternative charge which required no complaint or consent; [*ibid.*]

(4) that the charge originally framed by the Magistrate against *M* was a charge which was not set out in the complaint made by the Insolvency Judge and that it was a charge which fell under sub s. (1) of s. 196-A of the Cr. P. C. of which the Magistrate could not take cognizance without a complaint by the Governor-General in Council or by the Local Government; [*ibid.*]

(5) that, therefore, the proceedings of the Magistrate as against *M* after the framing of the charge, were without jurisdiction and the alternative charge subsequently framed by the Magistrate could not be allowed to stand. [p. 308, col. 2.]

Criminal revision from an order of the District Magistrate, Insein, in his Criminal Trial No. 1 of 1924.

Messrs. *De Glanville Cowasjee* and *Dass*, for the Petitioners.

Mr. *Gaunt*, Assistant Goverment Advocate, for the Crown.

JUDGMENT.

Robinson, C. J.—This is an application for revision of an order passed by the District Magistrate, Insein, and also raising the question of the legality of the whole proceedings in the trial which has now been lasting for several months.

The immediate question raised did not strike any of the numerous Counsel engaged in the case, so that the attack on the jurisdiction of the Magistrate is very belated.

After, however, hearing Counsel for the Crown, we decided that we would hear this application although the trial was not concluded, as, owing to the facts and circumstances on which the pleas are based, the objections go to the very root of the legality of the trial.

It is necessary for a complete understanding of the points, with which we have to deal, that the facts should be set out though as briefly as possible.

It is said that one Abdul Rahman was a rival in business of a firm carrying on business under the style of "D. K. Cassim & Sons." Owing to this, rivalry and to some ill-feeling, it is said that Abdul Rahman entered into a conspiracy with one S. P. S. Mani Iyer to injure his rival in business by getting him adjudicated insolvent.

D. K. Cassim & Sons' immoveable properties were under attachment by the Court of Insein. Mani Iyer filed an application to adjudicate, setting out as the act of insolvency that their properties had been under attachment for three weeks and over. The application was strenuously opposed

respondents alleging that their financial position was very good, and denying that their properties had been under attachment for three weeks. They alleged that the warrants of attachment had been forged by altering the date from the 27th of November to the 20th and 21st of November.

After a full enquiry by the Judge sitting in insolvency, the application to adjudicate was dismissed. The matter, however, did not end there. He was of opinion that, in the interests of justice, steps should be taken to prosecute Abdul Rahman, Mani Iyer and one Guruswamy. This latter has since been discharged and I need not mention him any further.

After issuing notice, the learned Judge laid a formal complaint under s. 476, Cr. P. C., and it is important to note the exact terms of that complaint. He said.—"In the opinion of the Court it is expedient in the interests of justice that an enquiry should be made into the said offence which is punishable under s. 120 B, read with ss. 466 and 109, Indian Penal Code, with rigorous imprisonment which may extend to seven years."

The conspiracy that is alleged, I understand, is a conspiracy to get D. K. Cassim & Sons adjudicated, and that conspiracy included a conspiracy to effect the necessary preliminary step of getting the attachment warrants forged.

The complaint was sent to the District Magistrate, Insein, who took action upon it, and framed charges against both Mani, Iyer and Abdul Rahman, which are as follows. The charges against both are in similar terms:—"That you on or about the 7th day of December 1923, at Insein, agreed with S. P. S. Mani Iyer to do an act, to wit, sought to have D. K. Mohamed Ebrahim and two other persons carrying on business under the name of D. K. Cassim & Sons adjudicated insolvent, which is not an illegal act, by illegal means, to wit the forging of a document purporting to be made by a public servant, and, in pursuance of that agreement, you did some acts, to wit, cause some person or persons unknown to so alter the dates of the execution of the warrants of attachment to the property in Civil Execution Cases Nos. 98 and 99 of 1923 of the Court of the Sub-Divisional Judge, Insein, Exs 16 and 17, as to make it appear that the said warrants had been executed on the 20th and 21st November 1923, respectively, instead of on or about the 27th of November 1923, that is, to commit the offence of forgery as described in s. 463, Indian Penal Code, and thereby committed an offence punishable under s. 120-B, Indian Penal Code, and within my cognizance."

An appeal was filed in this Court against the order formulating a complaint under s. 476, Cr. P. C. The result of that appeal was that we set aside the complaint so far as it related to Abdul Rahman, on the ground that the learned Judge sitting in insolvency had only jurisdiction to lay a complaint, in respect of parties to the proceedings before him, out of which the necessity for laying a complaint arose. Abdul Rahman had not been a party to those proceedings. That, I may mention, was the view that was taken by the Calcutta High Court in the case of *Girdharee Lal* v. *Emperor* (1).

In the course of my judgment in the appeal I said—"It will, of course, be open to the Court, if it sees good grounds for so doing, to take action against them (Abdul Rahman and Guruswamy) also or it will be open to the respondent to lay a complaint before the Magistrate in respect to them."

This sentence has been completely misunderstood by Counsel for the complainant, by Counsel for the Crown, and by the learned District Magistrate himself.

It has been assumed that I expressed the opinion that, having taken cognizance properly of the case against Mani Iyer on the complaint under s. 476, it was open to the Court, when acting either of its own motion or on a complaint by the complainant, to entirely disregard the express provisions of the Code in respect of certain offences. That, of course, was not my meaning, and to frame on the authority of this sentence, in my judgment, a charge under s. 120-B, Indian Penal Code, without any complaint or consent such as is required by s. 196-A, Cr. P. C., was entirely wrong. The offence, that was obviously as I thought in my mind, was the offence of abetment of forgery under ss. 466 and 109, Indian Penal Code, for which no complaint or sanction was required by any provision of the Code.

The learned Counsel for the complainant, however, drafted and presented a complaint, which follows almost *verbatim* the com-

(1) 42 Ind. Cas. 133; 21 C. W. N. 950; 18 Cr. L. J. 901.

plaint, laid by the learned Judge sitting in insolvency. On that complaint the District Magistrate took proceedings against Abdul Rahman, and those proceedings went on unchallenged for several months, and no objection was raised to the joint trial of Abdul Rahman and Mani Iyer.

When Mr. deGlanville was retained for Abdul Rahman, and the possibility of objection was apparent, Counsel for the Crown asked for additional charges to be framed—charges of abetment of forgery. This request was apparently at first refused, but when shortly after Mr. deGlanville raised his objection to the jurisdiction of the Court, Counsel for the Crown, in reply to the objection, re-iterated his request for additional charges. After hearing Counsel on both matters, the learned District Magistrate passed the order, against which the present application for revision is made. He framed alternative charges under ss. 466 and 109 of the Indian Penal Code against both accused.

It is, I think, perfectly clear that what the prosecution alleges in this case is that Abdul Rahman and Mani Iyer entered into a conspiracy to injure the former's trade-rival by getting him adjudicated insolvent; that in order to do that, they found it necessary to instigate persons to forge certain warrants of attachment ; that, in pursuance of this conspiracy, they procured the forgery of those warrants ; and that, having effected this necessary preliminary step, Mani Iyer, in furtherance of the conspiracy, filed his application to adjudicate. If that be the case, I am not prepared to hold, nor is it necessary that I should hold or not hold or come, indeed, to any decision as to whether Abdul Rahman and Mani Iyer could be tried jointly in one trial.

It is said that there were two conspiracies—one to cause the forgeries, and the other to procure the adjudication ; and whether that is so or not is for the Magistrate to decide if and when the matter is raised before him. I mention it because it was openly stated to us that Abdul Rahman did not desire to be tried jointly with Mani Iyer ; but it is not necessary for the purposes of the present decision to go any further into that matter.

I have set out the charges originally framed by the Magistrate against both petitioners ; and I have set out the terms of the complaint laid by the learned Judge sitting in insolvency. That complaint is one of criminal conspiracy under s. 120-B, read with ss. 466 and 109, Indian Penal Code.

As to s. 120-B, Indian Penal Code, the Cr. P. C. in s 195-A lays down that, where the object of the conspiracy is to commit an illegal act, other than an offence, or a legal act by illegal means, no Court shall take cognizance of the offence unless upon complaint made by order, or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf.

The charge, as framed by the Magistrate, is a charge of doing a legal act by illegal means, and the provisions of sub-s. (1) of s. 196, therefore, apply to it.

It is to be noted that the complaint laid was not a complaint of a criminal conspiracy, the object of which was to commit a legal act by illegal means. Moreover, the punishment for the offence, which is charged in the orginal charges, is imprisonment for a term of six months, whereas in the complaint it is expressly stated that the offence complained of is punishable with rigorous imprisonment which may extend to seven years. This is an offence to which neither the provisions of sub-s. (1) or sub-s. (2) of s. 196-A apply, because of the proviso attached to sub-s. (2) of the section, which renders no consent by the Local Government or any other authority necessary in the cases to which the provisions of sub-s. (4) of s. 195 of the Cr. P. C. apply. This sub-s. (4) relates back to offences specified in s. 195 (1) (c) of the Code, that is, offences committed by a party to any proceedings in any Court in respect of a document produced or given in evidence in such proceedings.

Abdul Rahman was not a party to the proceedings before the Judge sitting in insolvency ; he was not a person who came within the purview of s. 195 (1) (c) of the Code; and, therefore, as regards him, the proviso to sub-s. (2) of the s. 196-A does not do away with the necessity for the sanction of the Local Government to the initiation of proceedings against him. This being so, the Magistrate took cognizance of the case against him on a complaint by the complainant alone, or he took cognizance of his own motion from information obtained during the course of the proceedings against Mani Iyer. In neither case could he take cognizance without the con-

sent of the Local Government if the case was one under the second sub-section of s. 196A, while, in respect of the charge that he actually framed, which is a charge falling within the purview of sub-s. (1) of s. 196 A, he would require a complaint by the Governor-General in Council, or he would require one from the Local Government to give him jurisdiction.

For these reasons I am of opinion that, as regards Abdul Rahman, the learned District Magistrate acted entirely without jurisdiction and in direct disobedience of the express provisions of the Code. This being so, the whole of his proceedings against Abdul Rahman were *ab initio* without jurisdiction and illegal.

It has been urged that the alternative charge now framed is sufficient to rectify any error that there may have been in his proceedings. I am quite unable to accept that argument. Having acted without jurisdiction throughout, the defect cannot be cured by now framing a charge which, by law, he was entitled to frame, and which, had he done so originally, would have avoided the present objection. It is impossible to hold that he could disregard the express provisions of the Code, and render legal all his previous trial, which was illegal, by now framing a charge of abetment of forgery, which required no complaint or consent.

We must, therefore, in my opinion, set aside all the proceedings so far held against Abdul Rahman, and direct that he be discharged, leaving it open to the Magistrate to proceed against Abdul Rahman if a complaint is laid before him of an offence under ss. 466 and 109 or any other sections which do not require the complaint of the Governor-General in Council, or consent of the Local Government, and if after examining the complainant, he sees fit to do so, or of an offence within the purview of s. 196-A with the necessary complaint or consent.

Coming now to the case of Mani Iyer, which is the second application before us, he was a party to the proceedings and the Magistrate could and should have acted on the complaint laid by the Judge sitting in insolvency. But the charge that he framed was not a charge set out in that complaint; it was an entirely different charge; it was a charge that fell under the first sub-section of s. 196A, and an offence of which he could not take cognizance without a complaint by the Governor-General in Council or of the Local Government. Had he framed a charge of the offence as specified in the complaint laid by the Judge sitting in insolvency, no other complaint and no consent by the Local Government would have been necessary. Had he taken cognizance of the case and framed a charge as laid out in the complaint, no objection could have been taken to his proceedings, and it would have been open to him at any time during the trial to have added the charge that he has since added, and tried, Mani Iyer on that charge as well as on the charge specified in the complaint.

I may refer to the case of *Abdul Salim* v. *Emperor* (2) wher it was held that a charge under ss. 120-B and 420, Indian Penal Code, of conspiring to cheat between certain dates may be legally joined with individual charges of every distinct offence committed in pursuance of the conspiracy by different members of it on different intermediate dates. It was further held that the legality of the joint trial depends on the accusation, and not on the result of the trial, and that the discretion of the Court to try accused persons separately is not improperly exercised by holding a joint trial in conspiracy cases. And it is further an authority for the proposition that s. 196-A, Cr. P. C., applies only to a prosecution for conspiracy punishable under s. 120-B of the Penal Code, and not for abetment by conspiracy punishable under s. 109 of the latter Code.

The District Magistrate, therefore, had no jurisdiction to frame the charge that he did originally frame against Mani Iyer, and we must set aside that charge in my opinion, and direct that he be discharged in respect of it. But the Magistrate had jurisdiction to frame a charge under s. 120 B read with ss. 466 and 109.

There remains the question as to the alternative charge now framed.

So far the Magistrate's proceedings appear to me to have been, up to the stage when a charge was framed, perfectly legal. His mistake was in framing a charge on the 21st October, which he was not entitled to frame by virtue of the complaint that had been laid. From that time onwards his proceedings were without jurisdiction and consequently his second charge, which he framed, must also be set aside.

For these reasons I would remit the pro-

(2) 69 Ind. Cas 145; 49 C. 573; 25 C. L. J. 279; 26 C. W. N. 680; (1922) A. I. R. (C.) 107; 23 Cr. L. J. 657.

ceedings to the Magistrate to be continued so far as Mani Iyer is concerned as from the stage they were in on the 21st October last, and to frame a charge in accordance with the complaint laid, it being open to the Magistrate to frame an additional charge under ss. 466 and 109 if he sees fit.

Godfrey, J.—I concur and have nothing to add.

Z. K. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 234 OF 1925.

April 6, 1925.

Present:—Mr. Kennedy, J. C., and Dr. De-Souza, A. J. C.

MOOLYAMAL TOPANDAS—APPLICANTS

versus

ALI MAHOMED JADOW—OPPONENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 435, 439—Dispute as to immoveable property—Procedure—Jurisdiction of Magistrate—Magistrate declining to take action—Revision, whether lies.

A Magistrate is only justified in applying the provisions of s. 145 of the Cr. P. C. when he anticipates that unless he interferes there will be a breach of the peace. He may so anticipate by reason of general information or by a particular representation from some person and if the person who makes that particular representation is the person whose possession is likely to be forcibly disturbed, then such person is in a position similar to a person who makes a complaint. But he is not a complainant and his petition is not a complaint. [p. 309, col. 2.]

If in a proceeding under s. 145 of the Cr. P. C. the Magistrate after issuing a preliminary order and holding an enquiry, comes to the conclusion that a declaratory order is necessary and passes such an order under cl. (6) of the section, such order is capable of revision under s. 435 of the Code. Where, however, he comes to the conclusion that there is no possibility of a breach of the peace and declines to proceed under s. 145 his order is not an order under cl. (6) of the section and is not liable to revision. [p. 310, col. 1.]

Application to revise an order of the First Class Magistrate, Mirpur Bathero, dated the 2nd December 1924

Mr *T. G. Elphinston*, Public Prosecutor, for the Crown.

Mr. *Hassomal M. Gurbusani*, for the Applicants

Mr. *Nadirbeg Mirza*, for the Opponents.

JUDGMENT.—Before dealing with the facts of this particular application we think it advisable to expatiate on the law as to s. 145, Cr. P. C., as we have seen that there is much ignorance of the provisions of that section and a general disregard of the rules laid down by the Legislature.

The procedure is primarily that by which a Magistrate enforces public order, and it is to enable him to do that he is given the powers conferred by Ch. XII. The Magistrate is only justified in applying the section when he anticipates that unless he interferes there will be a breach of peace. He may so anticipate by reason of general information or by a particular representation from some person and if the person who gives that particular representation is the person whose possession is likely to be forcibly disturbed then such person is no doubt in a position similar to a person who makes a complaint. But for all that such a person is not a complainant and his petition is not a complaint. The Magistrate or the Court superior to the Magistrate to whom the information is given cannot act at all, unless there is a subjective feeling in the mind of the Magistrate or such superior Court that there is the danger of breach of the peace if remedy be not applied. A person whose security is menaced can probably claim the aid of the Magistrate *ex debito justitiæ* and presumably if the Magistrate refused to exercise his jurisdiction on improper grounds a superior Court would compel him to. But when all is said and done the issue of an order is a matter of discretion. There are other ways by which a man whose possession if wrongly menaced can secure himself.

As soon as the Magistrate is convinced that he ought to act he must write down the reason why he thinks he ought to act, and serve a copy on the person against whom he intends to proceed in the same way as a summons is served.

So far, when the Magistrate acts on the representation of a person who anticipates that he is to be forcibly ousted the procedure is analogous to the procedure of a Magistrate who has taken cognizance of a complaint and has issued process yet the application is not a complaint.

Just as in the case of a complaint it is often proper for a Magistrate to make further enquiries before acting, it may well be that as in the case of a complaint a Magistrate after such enquiry comes to the conclusion that he should

not issue process, so in case of a representation under s. 145 it may be that the Magistrate comes to the conclusion that there is no danger of a breach of the peace and, therefore, refuses to draw up a preliminary order. Superior Courts are given special power to direct the Magistrate to proceed in the case of complaints dismissed under s 203 but they are not given such special power to compel a Magistrate to act under s. 145 and their power so to compel him is a special and extraordinary power, and is not to be applied except on very good grounds.

If the Magistrate after issuing a preliminary order and holding an enquiry, comes to the decision that a declaratory order is necessary, he passes such an order under cl. (6) of the section, and that order is now capable of revision under s. 435.

Turning to the present case it appears that the original application by the present applicant was vicious. It was an attempt to combine a complaint of offences punishable under the Penal Code with a representation that circumstances existed calling for the exercise of powers under s. 145, Cr. P. C., by the Magistrate. Such a confusion of application is, if not wholly irregular, at least most, undesirable. The Magistrate held a preliminary enquiry and came to the conclusion that the facts stated in the application were not true, and that, therefore, there was no probability of a breach of the peace. He, therefore, dismissed the complaint of substantive offences and refused to proceed under s. 145. As regards the latter part of the order then, the order is not an order under s. 145, cl. (6) and is not, therefore, an order liable to revision on the merits.

The Magistrate has committed no irregularities. He has not reached the stage where a regular enquiry was to be held and his order is a perfectly legal order. If he did not think there was any likelihood of a breach of the peace he was in duty bound to refuse to proceed as he has refused. Moreover, his conclusions seem to be correct. There seems here to be a clear attempt by the applicant to use the machinery of the Criminal Law for the purpose of taking a short cut to a civil relief. We see no reason to interfere and dismiss this application.

Z. K. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 82 OF 1925.

June 1, 1925.

Present:—Mr. Dalal, J. C.

KALLU BARI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 263, 264—Summary trial—Appealable case—Charge and notes of evidence, whether necessary.

In a case tried summarily by a Magistrate in which an appeal lies a charge need not be framed and notes of the evidence of the witnesses need not be taken. Under s. 264 of the Cr. P. C. all that is necessary in such a case is a judgment embodying the substance of the evidence and containing the particulars mentioned under s. 263.

Natabar Khan v. *Emperor*, 82 Ind. Cas. 278; 27 C. W. N. 923; (1924) A. I. R. (C.) 63; 25 Cr. L. J. 1270, dissented from.

Criminal revision against an order of the Sessions Judge, Rae Bareli, dated the 12th May 1925, upholding that of the Magistrate, First Class, Partabgarh, dated the 25th March 1925.

Mr. *M. H. D. Chandra*, for the Applicant.

ORDER.—There is no force in this application for revision. The trial was summary. Section 264, Cr. P. C., provides for such a trial where an appeal lies. That section lays down: "In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in s. 263. Such judgment shall be the only record in cases coming within this section."

In face of these direct provisions of the law it is difficult to understand the argument of the learned Counsel that there ought to be a charge and also notes of the evidence of witnesses. I am the more surprised when the learned Counsel was able to produce a judgment of a Bench of the Calcutta High Court in support of his contention [*Natabar Khan* v. *Emperor* (1)]. What I believe is that the learned Judges in that case omitted to look at the provisions of s. 264, Cr. P. C., and were under the impression that Ch. XXII of the Cr. P. C. provides only for cases where there was no appeal and contained no directions as to cases in which an appeal lay. The provisions of s. 264 are entirely ignored in the judgment of the Bench. With all respect such a defective judgment cannot receive

(1) 82 Ind. Cas. 278; 27 C. W. N. 923; (1924) A. I. R. (C.) 63; 25 Cr. L. J. 1270.

any consideration. A procedure is definitely laid down by law and that procedure was followed by the Trial Court. I dismiss this application. If the applicant is on bail he shall surrender to undergo the balance of his sentence.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1067 OF 1924.

March 4, 1925.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.

NAWAB AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal trial—Evidence of old criminal produced by Police, value of.

No reliance can ordinarily be placed on the uncorroborated testimony of a witness who is an old criminal, especially when he is produced by the Police under whose supervision he is. Such a witness is doubly unworthy of credit if the story that he tells is on the face of it improbable. [p. 312, col. 1.]

No criminal can be expected to reveal his participation in a heinous offence merely for the asking. [*ibid.*]

Appeal from an order of the Sessions Judge, Jhelum, dated the 3rd November 1924.

Dr. *Nand Lal*, for the Appellants.

Mr. *Des Raj Sawhney*, for the Opposite Party.

JUDGMENT.—The four appellants, whose names, etc., are 1. Nawab Awan, of Rawal Zer, aged 50 years. 2. Nek Muhammad, Malyar of Rawel Zer, aged 25. 3. Muhammad. Kashmiri, of Rawal Zer, aged 25. 4. Muhammad, Malyar of Ghugh, aged 60 have been convicted by the Sessions Judge, Jhelum, of the murder of one Samundar Awan, of the village of Rawal Zer, and three of them have been sentenced to suffer the penalty of death and the fourth Muhammad, Malyar is transported for life.

Samundar, a young man of 30 years of age, was married in the village Thanil Kamal, which is ten miles from his village Rawal Zer. His wife was delivered of a child at the village Rawal Zer and his mother-in-law, who had come to attend on her daughter during her confinement, left for her village Thanil Kamal on the morning of 10th *Ramzan* corresponding to 15th April 1924. Samundar accompanied her to escort her home promising to return the next day. But though he started back from Thanil Kamal the next morning, he did not reach home. His father waited for him for three or four days and then he and his relatives instituted a search for him but could find no trace of him. On the 24th April his disappearance was reported to the Police and a Sub-Inspector then made a search for the missing man from the 25th April to 2nd May, but found no clue. The relatives of Samundar, however, kept on searching and on the 17th May his brother Karam Ilahi found the bones of a human being buried some 16 *karams* from a foot-path. The bones were in a shirt but one bone was visible. There was another bundle containing barries and bread. A stick, a pair of shoes and a *chadar* were also found with the bones. Karam Ilahi lost no time in reporting this discovery of the remains to the Police and on that report a charge under s. 302, Indian Penal Code, was registered and a Sub Inspector arrived on the spot and despatched the remains for *post mortem* examination. According to the testimony of the medical witness who made the autopsy, soft parts were totally decomposed and only bones were available for examination; so it was not possible to discover the cause of death, but he was of opinion that the bones were of a male human being.

In the report made by Karam Ilahi on the 17th May he charged three men with the murder of his brother, *i. e.*, Nawab and Nek Muhammad (appellants Nos. 1 and 2) and one Abdullah, but no evidence was forthcoming to connect any person with the alleged murder and to reveal how it was committed. The Investigating Officer, however, got hold of Mehdi, who accepting a tender of pardon turned King's evidence. His story briefly was that Nawab appellant offered to pay Rs. 200 for the murder of Samundar, that he and the remaining three appellants entered into a conspiracy with Nawab to commit the murder and that all five way-laid Samundar early in the morning as he was returning from Thanil Kamal, strangled him with his turban, and buried his body near there.

That he was strangled is not proved by any independent evidence, and the body was not found at the place where according

to the approver it had been buried. Further there is no part of his account of the murder which receives support from other evidence. But assuming that the approver participated in the murder, there remains the question of corroboration of his testimony as against each appellant, and in this connection we have to consider the evidence of Muhammad Bakhsh (P. W. No. 21), Nadir (P. W. No. 15) and Bahadur Khan *lambardar* (P. W. No. 20) which evidence was relied upon by the learned Sessions Judge.

Muhammad Bakhsh is an old criminal and after undergoing a sentence of seven years' rigorous imprisonment for dacoity he is now under Police surveillance for five years. He deposed to two facts:—(1) that on the night of the 10th or 11th *Ramzan* he saw the approver and Nek Muhammad appellant going towards the *chari*. This even if true is of little importance, and the learned Sessions Judge's remark in respect of it is: "We have for what it is worth the evidence of Muhammad Bakhsh (P. W. No. 21) that Nek Muhammad and Nawab visited the approver." The learned Sessions Judge has partly misquoted the witness because he did not state that Nawab also was with Nek Muhammad and the approver, (2) that after the corpse had been recovered the witness asked the approver if he knew anything about it and that the approver thereupon said that he, Nawab, Nek Muhammad and the two Muhammads had all five killed Samundar. The witness did not mention this to anybody but strange to say the Sub-Inspector came to know of it and he called him and asked him if Mehdi (approver) had made that admission to him. No reliance is ordinarily placed on the uncorroborated testimony of a criminal of the type of Muhammad Bakhsh, specially when he is produced by the Police under whose supervision he is. But he is doubly unworthy of credit because the story that he tells is on the face of it highly improbable. He did not tell why the approver disclosed to him this secret of his. No criminal can be expected to reveal his participation in a heinous offence merely for the asking. But after all this testimony taken even at its face value affords no corroboration of the approver's version against the appellants, which whether given in Court or out of Court, should receive support from independent evidence.

The testimony of Nadir (P. W. No. 15) that he saw Nawab, Nek Muhammad and Muhammad, Kashmiri in a mosque saying prayers leads to no inference and the learned Sessions Judge also drew none from it. Bahadur Khan *lambardar* deposed that Nawab met him one day and told him that the body had been so well concealed that the Police would not find it. In respect of this evidence the learned Sessions Judge observes:—

"The fact that Bahadur Khan did not tell the Police till a week after and then only mentioned it casually somewhat weakens the value of his evidence though it does not entirely destory it."

To us this evidence appears to be quite incredible because no offender would make an admission of this nature to a *lambardar* who happens to come across him in the way, and even if one should do so the *lambardar* would not fail to communicate it immediately to the Police. This *lambardar* however, did not tell anybody about it for seven days.

Thus we find no reliable evidence on the record to corroborate the testimony of the approver against any of the appellants. Nor do we find any intrinsic indication of the truth of that testimony. The learned Public Prosecutor frankly admits that there is no corroborative evidence worth the name. This being so it would serve no useful purpose to detail here certain other circumstances which militate against the prosecution theory. We, therefore, are unable to maintain the convictions, and accepting the appeal we set aside the convictions and sentences and direct that the appellants be released forthwith.

Z. K. *Appeal accepted*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 5-B of 1925.

January 15, 1925.

Present:—Mr. Justice Brown.

NGA HLA U—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 537—Examination of accused before charge—Further cross-examination of prosecution witnesses—Examination of accused, further, absence of—Irregularity.

The intention of the framers of the Cr. P. C. was to frame the Code in such a way that mere technical defects would not have the effect of vitiating proceedings. The mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings. [p. 315, col. 1.]

Where an accused person is examined at length after the close of the prosecution evidence and before the framing of the charge and some of the prosecution witnesses are further cross-examined after the charge, the omission to examine the accused after such further cross-examination does not, in the absence of proof of prejudice to the accused, vitiate the proceedings. [*ibid.*]

Case-law discussed.

Criminal revision from an order of the Additional Special Power Magistrate, Zigon, in Criminal Regular No. 174 of 1924.

JUDGMENT.—One Nga Hla U was prosecuted under the provisions of s. 408, Indian Penal Code, for criminal breach of trust. He was originally convicted by the Additional Magistrate, Prome, and sentenced to nine months' rigorous imprisonment. He appealed, and the appeal was heard by the Sessions Judge, Tharrawaddy, who set aside the conviction, and ordered a re-trial on the ground that the Magistrate had not complied with the provisions of s. 342 of the Cr. P. C. The case was again tried by another Magistrate, who again convicted, and Nga Hla U again appealed to the Sessions Judge, Tharrawaddy.

The matter has been referred to this Court by the learned Sessions Judge on the following grounds. In the re-trial the Magistrate examined all the prosecution witnesses, and then examined the accused and charged him. After this examination and the framing of the charge, two of the prosecution witnesses were re-called for further cross examination, but the accused was not further examined after this cross-examination. The view of the learned Sessions Judge is that this failure further to examine the accused on the part of the Magistrate amounts to an illegality which vitiates the whole trial. He is of opinion that the only course open to him would be to set aside the conviction, and order a third trial. It was for the same reason that the first trial was set aside and a re-trial ordered.

The undesirability of having a third trial is clear, and the proceedings have been submitted to this Court with a recommendation that this Court in revision should pass an order for the continuation of the trial by the Magistrate from the point where he wrongly omitted to examine the accused.

The view of the learned Sessions Judge that the absence of any examination of the accused after the cross-examination of the two prosecution witnesses is an illegality which, of necessity and apart from any question of miscarriage of justice, vitiates the trial, is a view supported by a considerable mass of judicial authority; but, with all respect to the opinions expressed in favour of this view, I find myself unable to accept it.

The Sessions Judge does not suggest in this case that the accused has, in any way, been prejudiced by the failure to question him further. The accused was examined at considerable length after the completion of the examination of the prosecution witnesses, and before the framing of the charge. No further prosecution witnesses were examined, but all that was subsequently done was to cross-examine two witnesses who had already been examined on behalf of the prosecution.

The accused himself did not raise this point in appeal, and I think it may be taken, as was apparently held by the learned Sessions Judge, that the point is a purely technical one, and that the accused has not, in any way, been prejudiced, by the failure of the Magistrate further to examine the witness.

I have examined the reports of a number of cases in which it was held that an illegality of this sort was fatal to the case. I have been able to find no judgment in the official rulings of this Court, or of the late Chief Court, or of the late Court of the Judicial Commissioner, Upper Burma, upon the subject except that of *Emperor* v. *Nga Po Mya* (1), which is published at page 18; Upper Burma Rulings, Volume III. In that case there was no examination of the accused whatsoever. It was held that the omission of the Magistrate to do so was fatal to the validity of the trial. But it is not necessary in this case to decide whether a total failure to examine the accused person vitiates the trial. In this case the accused person was examined at length. The only irregularity or illegality, if any such exists, was that the Magistrate did not examine him after the cross-examination of the witnesses for the prosecution was complete.

In the case of *Raghu Bhumij* v. *Emperor* (2), it was held that an omission to examine

(1) 42 Ind. Cas. 176; 3 U. B. R. (1917) 18; 11 Bur. L. T. 134; 18 Cr. L. J. 944.

(2) 58 Ind. Cas. 49; 1 P. L. T. 241; 5 P. L. J. 430; 21 Cr. L. J. 705.

an accused person in a Sessions case was not a mere irregularity curable by s. 537 of the Court, but was fatal to the trial. A number of previous cases were referred to in which such an omission was held to be fatal.

There is undoubtedly a large volume of authority for this view, but I have been unable to find precisely on what ground it has been based. It has often been suggested that a non-compliance with a mandatory provision of the Cr P. C. cannot, in any circumstances, be cured by the provisions of s. 537 of the Code, and must invalidate the whole trial. I cannot find any authority for this view. The fact that s. 537 itself refers to errors and omissions in the proceedings suggests that there are cases in which a mandatory provision has not been complied with, but to which, nevertheless, the provisions of s. 537 would apply. For an omission to take place, it would appear that there must be some neglect to comply with some definite order in the Code. The decision of their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v. *Emperor* (3), has sometimes been referred to as authority for the principle that non-compliance with a mandatory provision of the Code is fatal to the trial, but I can find nothing in the judgment of their Lordships to justify this view. What their Lordships observed in that case was that they were "unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment...../... The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the Criminal Law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity." A positive enactment by the Code that a certain trial shall not take place is obviously a very different thing from a positive enactment that in the course of such a trial certain detailed procedure shall be followed. In the one case an infringement of the enactment amounts to an assumption of jurisdiction, and vitiates the trial from the very beginning. In the other case an infringement merely amounts to an error, omission or irregularity in the procedure adopted in the course of the trial. I have never heard it suggested that the neglect of a Magistrate to sign the deposition of a witness vitiates the whole trial, yet that is just as much an infringement of the mandatory provisions of s. 356 of the Code as the failure to examine the accused is an infringement of the provisions of s. 342. The failure to examine an accused person is, no doubt, a more serious irregularity than the failure to sign a deposition form, but the provisions of the law are as mandatory in the one case as in the other. Chapter XIV of the Cr. P. C., which deals with irregular proceedings, sets forth that in certain circumstances the proceedings of a Court shall be void ; but there is no section which says that a procedure such as is said to have been adopted in the present case makes the whole proceedings void. On the other hand, in s. 537 it is laid down in very wide terms that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch. XXVII, or on appeal or revision, on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or other proceedings before or during trial, or in any enquiry or other proceedings under the Code unless a failure of justice has been occasioned. These terms are very wide, and seem to me to be framed to meet such a case as the present. There is no question here of the proceedings being vitiated from the first. The contention is that because the Magistrate omitted further to examine the accused person after cross-examination of the prosecution witnesses, that is to adopt a certain procedure in the course of the trial, the proceedings became void. I cannot hold that at the most this was more than an error, omission or irregularity within the meaning of s. 537, or that there is any authority in the Code for treating the proceedings as void simply because of this omission.

The Madras High Court was at one time of opinion that the adoption of the procedure adopted in this case was necessarily fatal to the trial ; but that

(3) 25 M. 61; 28 I. A. 257; 3 Bom. L. R. 540; 11 M. L. J. 233; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

decision has now been overruled by a Full Bench ruling of the same Court in the case of *In re, Varisai Rowther* (4). It was held that it was not obligatory on the Court to examine the accused further after cross-examination of the prosecution witnesses if he has already been examined generally on the case after the examination-in chief. If this view be correct, then there can be no question of the trial being vitiated in the present case.

The contrary view has, however, been taken by the High Court of Calcutta. But, whichever view is correct as to the precise meaning of the terms of s. 342, and the exact stage of the trial at which the accused should be examined, I am of opinion that such a mistake or omission, if it is a mistake or omission, as has occurred in this case does not necessarily vitiate the trial.

This is the view which has recently been taken by the High Court of Allahabad in the case of *Bechu Chaube* v. *Emperor* (5). The tests to be applied in deciding whether a particular infringement of the provisions of the Code vitiated the whole trial were there stated to be, " Does the error go to the whole root of the trial ? Does it in effect vitiate the proceedings ? Has the Court assumed an authority which it does not possess ? Has it broken the vital rules of procedure ? If the error is of such a nature, the proceedings are vitiated in their very inception and s. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings." In this opinion I agree. It seems to me clear that the intention of the framers of Cr. P. C. was to frame the Code in such a way that mere technical defects would not have the effect of vitiating proceedings.

The learned Sessions Judge himself in his order of reference remarks :—" Apart from the needless expense and delay, the prestige of the Courts would suffer by such an order ; indeed, a third trial, on account of a highly technical mistake in procedure, might well lead to some ridicule of the Judicial administration of the country." With these remarks I fully agree ; but I am unable to find anything in the Cr. P. C., which makes it necessary to hold that such a state of affairs as to make a further trial necessary does arise in this case.

If the view taken by the High Court of Madras is correct, then there has been no irregularity, and the question of the proceedings being vitiated does not arise. If the view taken by the High Court of Calcutta be correct, the proper stage of the trial at which to examine the accused is after the prosecution witnesses have been fully cross-examined. Then all that has occurred in this case is that the examination has been conducted at a slightly earlier stage of the proceedings than provided by law. I cannot look upon such an error as going to the root of the trial. It appears to me to be at most a mere mistake in the course of the trial, and a mistake which has not, in any way, materially prejudiced the accused. It is not a question here of an entire failure to examine the accused person, but merely a question as to the accused having been examined at the wrong stage of the proceedings. It does not appear to have been suggested that if the examination had been deferred, or if further questions had been put to the accused after the cross-examination of the prosecution witnesses the accused would be in any better case. As I have said, the accused himself does not raise the point in his appeal, although he was represented by a Pleader.

In my view of the law there is no reason for holding that the trial by the Magistrate in this case is vitiated. I do not, therefore, consider that there is any good ground for this Court to order any further enquiry or trial, and the proceedings will be returned to the Sessions Court for decision of the appeal on its merits.

Z. K. *Proceedings returned.*

(4) 73 Ind. Cas. 163; 46 M. 449; 44 M. L J. 567; 17 L. W. 722; 32 M. L. T. 385; (1923) M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J 547.

(5) 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; (1923) A. I. R. (A.) 81; 24 Cr. L. J. 67.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 57 1924.

March 28, 1924.

Present:—Mr. Justice Fforde.

KHEM CHAND AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Practice—Criminal trial—Court, duty of—Judicial and executive considerations, distinction between—Prosecution evidence not sufficient to justify order—Retrial, whether can be ordered,

A Judge must keep separate judicial and executive considerations. It is not his duty to supplement the failure of the prosecution to prove their case against the accused by directing a fresh trial on purely executive grounds. [p. 316, col. 2.]

Where in an appeal against an order directing an accused person to furnish security the Appellate Court comes to the conclusion that the evidence on the record is not sufficient to justify an order demanding security, the order must be set aside. In such a case the Appellate Court has no power to direct a re-trial merely on executive considerations. [*ibid.*]

Petition under s. 439, Cr. P. C., for revision of an order of the Sessions Judge, Karnal, dated the 31st October 1923.

Dr *G. C. Narang*, for the Petitioners.

JUDGMENT.—There are two petitions before me for revision of an order of the Sessions Judge of Karnal made on appeal from two orders of a Magistrate of the First Class. Both orders were made under the provisions of s. 107, Cr. P. C. In one of these cases the appellants are Khem Chand and Baij Nath and in the other case fifteen persons are concerned whose names need not be set out. Both the appeals have been dealt with by the learned Sessions Judge in one judgment and it is this judgment which is before me upon the two applications for revision. The Trail Court in each case ordered the present petitioners to furnish security in the sum of Rs. 2000 with one surety each or in default to suffer one year's simple imprisonment.

On appeal the learned Sessions Judge in dealing with the case of the fifteen persons says in his judgment that in order to sustain a conviction there must be evidence "(1) of a dangerous situation," (2) that each person to be on security is likely to fight himself or to induce or provoke others to fight." He then continues:—"Now there is no doubt about the first of these conditions at Panipat but the second is signally lacking in the appeals before me. The evidence in the principal case (*i. e.* the case of fifteen persons) consisted of three persons only, the Sub-Inspector, the Tahsildar and the *Sofedposh* (all *Mussalmans*). They simply state in general terms that there was a danger of a breach of the peace from the accused This is insufficient; there must be individual evidence against each man. It is quite clear that many of the appellants are not likely to fight themselves. In that case there must be specific evidence showing that they have incited or provoked others or are likely to do so.

With these observations I am in entire agreement. But the learned Sessions Judge having satisfied himself and quite correctly so that there is not sufficient evidence on the record to warrant a conviction proceeds as follows:—"In an ordinary case I should accept the appeal and cancel the bond. But the circumstances are not ordinary. As the dates quoted show proceedings were taken as a hasty executive measure without any idea that there would be appeals especially to Sessions Court. I understand that at the time a settlement was hoped for and that in the event of a settlement all the bail bonds would have been cancelled. But there has been no settlement. Acute tension still prevails in Panipat and to accept these appeals wholesale might cause very serious difficulty. Accordingly I remand the case to the Court of the Special Magistrate at Panipat in order to take further evidence in accordance with the above principles."

I find it very hard to understand the attitude adopted by the learned Sessions Judge. It appears to me that he has signally failed to keep separate judicial and executive considerations. He seems to think that it is his duty to supplement the failure of the prosecution to prove their case against the accused persons in the Trial Court by directing a fresh trial on purely executive grounds. He practically holds that the petitioners have been wrongly convicted but that as the situation in Panipat is likely, to cause an embarrasing situation for the executive authorities it is necessary that the appellants should be offered up as victims to avert this calamity. To my mind such a course is a travesty of justice.

It is quite clear that such evidence as could be made available was in fact produced at the trial and the learned Sessions Judge has rightly held that this evidence is insufficient to justify a conviction, and accordingly he should have done what his judicial instinct promoted him to do, namely, accept the appeals. He, however, was coerced by executive consideration to proceed in the highly unusual mode which he has adopted. So far as the petitioners Khem Chand and Baij Nath are concerned the situation verges on the farcical. It appears that these two persons who appear to be highly respectable citizens of Panipat formed part of a conciliation committee and were present with the object of bringing about a reconciliation

between two communities which at the time had fallen out.

It is clear from the judgment of the Sessions Judge that the appeals against the conviction should have been accepted. Under the circumstances I feel bound to set aside the order of remand of the lower Appellate Court and to quash the coviction and sentences of all the petitioners in both the cases. In doing so I am merely following a course which the learned Sessions Judge would himself admittedly have adopted had he felt free to disregard purely executive considerations.

Z. K. *Petition accepted.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 998-B OF 1924.

February 6, 1925.

Present:—Mr. Justice Carr.

MAUNG DUN—APPLICANT

versus

MA SEIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance order—Restitution of conjugal rights, decree for, effect of—Cancellation of order—Duty of Magistrate.

A decree for restitution of conjugal rights obtained by a husband from a competent Civil Court does not by itself operate to cancel a maintenance order previously made against the husband under s. 488 of the Cr. P. C., and in considering any application made by the husband for the cancellation of such order on the ground that he has obtained a decree for restitution of conjugal rights, the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstances which may be brought before him. [p. 319, col. 1.]

Criminal revision from an order of the Township Magistrate, Ye, in Criminal Miscellaneous Trial No. 17 of 1921.

JUDGMENT.—In July 1921, Ma Sein obtained a maintenance order against her husband Maung Dun. In 1922, Maung Dun sued for restitution of conjugal rights and in November of that year a decree was passed by consent. In Miscellaneous Case No 15 of 1924 of the Township Magistrate of Ye, Maung Dun applied for cancellation of the maintenance order. About a month later, in Miscellaneous No. 17, Ma Sein applied for recovery of Rs. 60 as arrears of maintenance.

Maung Dun's application was dismissed by the Magistrate and Maung Dun then applied in revision to the Sessions Judge of Amherst, who has referred the cases to this Court with a recommendation that the maintenance order be cancelled and that the proceedings in Criminal Miscellaneous No 17 be closed.

Before the Magistrate, Maung Dun stated that he had asked Ma Sein, before elders, to return to him and that she had refused to do so unless she got her expenses.

The witnesses told a different story. They say that Maung Dun came to U Hlaing's house and asked that Ma Sein be sent for. She came and Maung Dun asked her if she would return to him. She said that she would and the parties then left. Two out of the three witnesses say that Ma Sein said she would come after drawing money from the Court. What happened afterwards the witnesses do not know.

Ma Sein herself says that she agreed to go with Maung Dun, but that she must go and get money. She asked him to come to her house but he would not. Maung Dun did not come again. She went and asked at Maung Pu's house but Maung Dun "went away." I take this to mean that he 'had gone away." She contends that Maung Dun had no *bona fide* wish to take her back and merely wished to get the maintenance order cancelled.

That seems to have been the view on which the Magistrate dismissed the application. On the evidence I do not think that sufficient cause is made out for the cancellation of the order.

The question remaining is whether the decree for restitution of conjugal rights itself renders the order void. There is authority for the view that it does.

This was held by the one Judge of the Chief Court in *Maung Tha U* v. *Ma Mya Khin* (1). Also by a Bench of the Bombay High Court in *In re Chandulal Ranchhod* (2). In this case the learned Judges gave the following explanation of their view—"The decree for restitution of conjugal rights is a statement by a Court of matrimonial jurisdiction that husband and wife are under an obligation to live together and that the wife had no right to live apart from her husband. The Magistrate's order of 1910 was in law a statement that the wife had a right to live apart from her husband, but of course, in the nature of things,

(1) 35 Ind. Cas. 972; 9 B L. T. 162; 17 Cr. L. J. 412.
(2) 52 Ind. Cas. 607; 43 B. 885; 21 Bom. L. R. 766; 20 Cr. L. J. 687.

any order made by a Magistrate in the exercise of the limited powers conferred on Magistrates by Ch. XXXVI of the Cr. P. C., is subject to the orders of Civil Courts exercising matrimonial jurisdiction." The application before the Court was one by the wife, asking under s. 489, Cr. P. C., for an increase in the order for maintenance. The final order was that the Magistrate should treat the application as one under s. 488 and proceed to decide whether at that time the wife was entitled to an order for maintenance.

Another case which has been much cited is *In re Bulakidas* (3). In this case no reasons for the decision were given. It was based on the case of *Lutpotee Doomony* v. *Tikha Moodoi* (4), and another unreported case. The former seems to be a very doubtful basis; it is difficult on the report to say what the learned Judges decided.

Nga Po Saw v. *Mi Thet* (5) is somewhat different. Here the wife applied for a maintenance order after the husband had obtained a decree for restitution of conjugal rights, and it appears that she raised no contention which she had not or could not have raised in defending that suit. This case is of little assistance.

On the other side we have *Devi Ditta* v. *Ganga Devi* (6) in which the judgment seems to imply that the decree for restitution might terminate the maintenance order, but that the order might be revived by subsequent circumstances. This does not seem very logical One would think that the order once determined, could not be revived, but that subsequent circumstances might give the wife the right to apply for a fresh order.

There are certain other decisions which bear indirectly on the question and which are to some extent conflicting. In *Maddu Venkayya* v. *Kamireddi Paidamma* (7) a man against whom an order had been passed for the maintenance of an illegitimate child sued for and obtained a declaration that the child was not his. He applied to the Magistrate to abstain from giving further effect to the maintenance order. The Magistrate refused to consider the application. The learned Judges order him to do so. Had they held that the decree terminated the maintenance order, presumably they would have passed final orders themselves. Incidentally the decision suggests that the Civil Courts have power to give such a declaration.

In *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (8), the husband against whom a maintenance order had been passed sued for a declaration that the relationship of husband and wife had been terminated and that he was not liable to pay the maintenance. He obtained the declaration of the termination of the relationship, but the Court held that it could not grant an injunction restraining the Magistrate from enforcing the maintenance order. The husband was referred to an application to the Magistrate based on the declaration.

In *Subad Domni* v. *Katiram Dome* (9) the plaintiff obtained a decree declaring that he was not the father of an illegitimate child for whom he had been ordered to pay maintenance. The High Court held that the decree could not affect the Magistrate's order even if the Civil Courts had had jurisdiction to pass such a decree. It held further that they had no such jurisdiction.

This decision was followed in *Sabhudra* v. *Basdeo Dube* (10). But in *Deraje Malinga Naika* v. *Marati Kaveri* (11), *Muhammad Abid Ali Kumar Kadar* v. *Ludden Sahiba* (8), was followed, and it was held that the Civil Courts had power to grant a declaration, but that no injunction could be issued restraining proceedings under a maintenance order. The effect of these two decisions seems to me to be that after a civil decree has been obtained, application should be made to the Magistrate to abstain from enforcing his order or to cancel it.

Finally there is the very recent English case of *Bragg* v. *Bragg* (12) in which the Court refused to interfere with a decision of a Magistrate refusing to discharge a maintenance order on proof of a decree *nisi* for divorce.

In view of all these decisions I think that, although there are direct decisions that a decree for restitution of conjugal rights *ipso facto* discharges an order for maintenance of the wife and there appear to be no

(3) 23 B. 484; 12 Ind. Dec. (N. S.) 322.
(4) 13 W. R. Cr. 52.
(5) 8 Ind. Cas. 479; U. B. R. (1910) I, 34; 11 Cr. L. J. 662.
(6) 4 P. R. 1906 Cr.; 4 Cr. L. J. 73; 115 P. L. R. 1907.
(7) 73 Ind. Cas. 944; 46 M. 721; 32 M. L. T. 345; (1923) M. W. N. 401; 18 L. W. 132; 45 M. L. J. 104; (1923) A. I. R. (M.) 707; 24 Cr. L. J. 720.
(8) 14 C. 276; 11 Ind. Jur. 296; 7 Ind. Dec. (N. S.) 183.
(9) 20 W. R. 58 Cr.
(10) 18 A. 29; A. W. N. (1895) 147; 8 Ind. Dec. (N. S.) 724.
(11) 30 M. 400; 2 M. L. T. 344; 7 Cr. L. J. 235.
(12) (1924) 41 T. L. R. 8; 69 S. J. 73.

direct decisions to the contrary, yet the proposition is one that is open to considerable doubt.

Had there been no change in the law since these decisions were given, I should have felt bound to refer the questions for decision by a Bench or a Full Bench. But there has in fact been a change. Act XVIII of 1923 added the following as sub-s. (2) to s. 489, Cr. P. C.:—"Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under s. 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the order accordingly."

From this it seems to me to follow that the order of a competent Civil Court does not of itself cancel the maintenance order and that in considering any such application as the present, the Magistrate is not necessarily bound to follow the order of the Civil Court but must consider it along with any other circumstances which may be brought before him.

On this view and on my finding that the petitioner did not make out sufficient cause for the cancellation of the order, I dismiss this application.

I also discharge the Sessions Judge's order staying proceeding on Ma Sein's application in Criminal Miscellaneous Case No. 17 of 1924 of the Township Magistrate, Ye.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 247 OF 1924.

March 31, 1924.

Present:—Mr. Justice Moti Sagar.

KALA RAM—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 451—House trespass with intent to commit adultery with married woman—Husband, consent of—Absence of husband, effect of.

A man who enters the house of another with intent to commit adultery with a married woman staying in the house is guilty of an offence under s. 451 of the Penal Code. In such a case if it is shown that the husband of the woman with whom the adultery was committed was at the time of the occurrence absent from the house it may be presumed that he neither consented to nor connived at any adultery or immorality on the part of his wife. [p. 320, col. 1.]

Petition, under s. 439, Cr. P. C., for revision of an order of the Sessions Judge, Multan, dated the 24th January 1924.

Lala *Hargopal*, for the Petitioner.

JUDGMENT.—In this case the petitioner Kala Ram was found guilty under s. 451, Indian Penal Code, and sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 100 by the Trial Magistrate. On appeal to the learned Sessions Judge the conviction was upheld, but the sentence of imprisonment was reduced to one of six months only and the sentence of fine was altogether remitted. He has now come up in revision to this Court.

The facts are briefly these. One Karam Ali with his wife *Musammat* Haliman and his daughter *Musammat* Fatima was living at the Kamalawala well in the Muzaffargarh District. He died on or about the 20th of August 1923. He had also another daughter *Musammat* Saddan who was married at *Mouza* Jalalpur Pirwala in the Shujabad Tahsil of the Multan District. On the death of her father she came to pay a visit of condolence to her parent's house in the Muzaffargarh District. On the 3rd of September 1923, *Musammat* Haliman and her daughter *Musammat* Fatima left the house to cut grass, and *Musammat* Saddan remained behind cooking food. It is alleged that the accused Kala Ram came and entering the house threw off his loincloth and seizing *Musammat* Saddan had sexual intercourse with her. On these facts the accused was convicted under s. 451 of the Indian Penal Code and sentenced as above indicated.

The only ground urged on his behalf is that there is no evidence on the record to prove that the husband of the woman had neither consented to nor connived at the adultery of his wife and that the conviction under s. 451, Indian Penal Code, was, therefore, illegal. The case of *Brij Basi* v. *Queen-Empress* (1) is relied on in support of this contention where it has been held that to sustain a conviction under the above section for the offence of house trespass with intent to commit an offence the prospective offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman the intent to commit adultery with whom is charged against the accused. The evidence in the present case, however, clearly

(1) 19 A. 74; A. W. N. (1896) 178; 9 Ind. Dec, (N. S.) 49.

shows that the husband, who was living in another village, was wholly ignorant of what was going on in his father-in law's house and that, therefore, he could neither consent to nor connive at the adultery of his wife. In a recent case decided by a Bench of this Court and reported as *Khannoon Ram* v. *Emperor* (2) it has been laid down that a man who enters the house of another at night with intent to commit adultery with his wife is guilty of an offence under s. 451 of the Indian Penal Code, and that if in such a case it is shown that the husband was at the time of the occurrence absent from the house in the legitimate pursuit of his occupation, it may safely be presumed that he neither consented to nor connived at any adultery or immorality on the part of his wife. The present case is in no way distinguishable from the one cited above, and I see no reason to interfere with the conviction. In the circumstances I do not think that the sentence of six months' rigorous imprisonment is excessive. The petitioner must surrender to his bail and serve out the unexpired portion of his sentence.

Z. K. *Petition dismissed.*

(2) 60 Ind. Cas. 666; 22 Cr. L. J. 266.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1124-B OF 1924.

February 6, 1925.

Present:—Mr. Justice Carr.

NGA PO THAN —ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Burma Habitual Offenders' Restriction Act (II of 1919), s. 9—Restriction order, whether can be passed against old offender—Order which has been set aside, whether can be considered.

The mere fact that an accused person is an old offender is not a ground on which a restriction order can be passed under s. 9 of the Burma Habitual Offenders' Restriction Act.

A Magistrate is not entitled to use an order which has been set aside, on whatever grounds, as proof that an accused person is an old offender.

Criminal revision from the judgment of the Sub-Divisional Magistrate, Minbu, in Criminal Regular Trial No. 88 of 1924.

JUDGMENT.—The petitioner was convicted under s. 380, Indian Penal Code, and was sentenced to eighteen months' rigorous imprisonment. In addition an order of restriction for two years after the expiry of his sentence was passed under s. 9 of the Burma Habitual Offenders' Restriction Act. With the conviction and sentence of imprisonment, there is no reason to interfere.

But the restriction order was very clearly illegal. The Magistrate's reason for passing it was as follows:—

"I find that the accused is an old offender because he was restricted to Mezali by the then Sub-Divisional Magistrate, Minbu, on the 24th September 1923, under s. 7 of the Habitual Offenders' Restriction Act, but the order was set aside by the District Magistrate, Minbu, on technical grounds."

The Magistrate was not entitled to use an order which had been set aside, on whatever grounds, as proof that the accused was an old offender. Moreover the mere fact that the accused is "an old offender" is not a ground on which a restriction order can be passed under s. 9 of the Habitual Offenders' Restriction Act That section provides only that such an order may be passed in a case in which an order could be passed under s. 565 of the Cr. P. C. and in certain special cases under the Rangoon Police Act.

Section 565 of the Cr. P. C. provides that an order under its provisions may be passed when a person who has before been convicted of one of certain specified offences under the Penal Code is again convicted of one of those offences. Its limits are, therefore, very clearly defined and it could not be applied to a case such as the present. That the Magistrate did apply it shows great carelessness on his part and it is not creditable to the Sessions Judge that he did not discover the illegality when the case came before him on appeal.

I confirm the conviction of Nga Po Than and the sentence of eighteen months' rigorous imprisonment passed on him, but set aside the order of restriction passed under s. 9 of the Burma Habitual Offenders' Restriction Act.

Z. K. *Order set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 7 OF 1925.

February 27, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

MESSRS. DEUTSCHE DAMPSCHIF-FAHRTS GESSELSCHAFT HANSA OF BREMEN—DEFENDANTS—APPELLANTS

versus

FIRM OF PESTONJI BIKHAJI—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Specific Relief Act (I of 1877), ss. 55, 57—Injunction, temporary, when can be granted—Contract of personal service, breach of, whether can be restrained.

The question of the grant of a temporary injunction is dealt with by the C. P. C., whereas the question of a permanent injunction is dealt with in the Specific Relief Act. But the principles applicable to the two proceedings are very similar. They both derive from the Court of Chancery and they postulate that a man will be punished if he does what his conscience tells him not to do. [p. 321, col. 2.]

A Court of Equity will not grant any injunction over the execution of which it cannot watch and which it cannot enforce. [*ibid.*]

A contract under which one party is required to perform numerous and delicate services for the other, the performance of which needs a particular amount of skill and fidelity, is one which cannot be specifically enforced by threats of penalty. [p. 321, col. 2; p. 322, col. 1.]

In such a case the Court will not, except in very special circumstances, where no other redress is open to the aggrieved party, issue an injunction restraining a breach of the contract the effect of which would be to enforce the contract specifically, inasmuch as an attempt to enforce such an order would be embarassing to the parties and derogatory to the Court itself. [*ibid.*]

Per *Rupchand, A. J. C.*—Preventive relief by way of injunction whether perpetual or temporary is within the discretion of the Court depending on the particular circumstances of each case. In order to entitle a plaintiff to a temporary injunction pending the disposal of the suit, the plaintiff must make out a *prima facie* strong case in support of the right which he claims and must show that irreparable damage will result to him if the injunction is not granted. [p. 322, col. 2.]

Case-law referred to.

Appeal against an order of the Additional Judicial Commissioner, dated the 10th February 1925.

Mr. *T. G. Elphinston*, for the Appellants.

Mr. *Dipchand Chandumal*, for the Respondents.

JUDGMENT.

Kennedy, J. C.—In this case a German Steamship Company had entered into a contract with Pestonji Bhicaji in respect of stevedoring the steamers of the Company. The contract, if valid, provides that the Company should employ the respondent, that is, Pestonji Bhicaji as stevedore, to the exclusion of any body else upto June 1926. The complaint of the respondents is that in spite of that contract the appellants have ceased to employ him and are employing other firms in the same line of business. He, therefore, brought an action asking to recover damages in respect of the three ships which the Company had stevedored by other firms and for an injunction restraining the appellants from employing stevedores for other steamers during the period of the contract, 30th of June 1926. The plaintiff-respondent asked for a temporary injunction directing the defendants-appellants to carry out the terms of their contract, that is, not to employ anybody else. That injunction was granted by the learned Additional Judicial Commissioner, and it is against that temporary injunction that the defendant-appellant steamship Company comes here in appeal.

The question is whether we ought to interfere at this stage. It will be seen that although in terms the injunction is one directing the defendant-appellant Company not to employ anybody else, it is in effect an order directing the Steamship Company to employ Pestonji Bhicaji because the nature of the case requires that the Company should employ stevedores and if it is prohibited from employing anybody else, it must employ Pestonji Bhicaji.

Now, it is true that the question of a temporary injunction is dealt with by the C. P. C., whereas the question of a permanent injunction is dealt with under the Specific Relief Act. But the principles applicable to the two proceedings are very similar. They both derive from the Court of Chancery and they postulate that a man will be punished if he does what his conscience tells him not to do. It is, therefore, impossible in disposing of temporary injunction to exclude from one's mind the English doctrine as contained in the Specific Relief Act. Now there is one thing that the Courts of Equity have always abstained from doing, that is from giving an order over the execution of which they cannot watch and which they cannot enforce, and reference to that will be found in s. 21 of the Specific Relief Act, cl. (*b*).

It is quite clear that a contract of this nature, namely, a contract by which the plaintiff-respondent is required to do numerous and delicate services for the defendant-appellant and has entered into a contract with him, the performance of which needs a particular amount of skill

and fidelity is one which cannot be specifically enforced by threats of penalty. There must be willing and loyal services on the part of the stevedores and genuine hearty co-operation between both the parties. And it is impossible for the Courts by any written order to lay down the exact limits of the relations of the two parties. To pass an order, therefore, by which defendant-appellant is virtually compelled to employ the plaintiff-respondent as his stevedore would be to leave the door open to continual applications to this Court to enforce its injunction and to embark it on a vast sea of investigation to ascertain whether its order has been complied with loyally. Except in very special circumstances where no other redress is open to the parties, the Court will not issue any such order both because to attempt to enforce such an order would be embarassing to the parties and because it would be derogatory to the Court itself.

Now, it seems quite clear that the wrong done to the plaintiff-respondent if wrong there be, can be remedied otherwise if his case be correct. In the case of each steamer an action for damages arises and it can easily be ascerta.ned how much loss he has suffered owing to the failure of the Company to employ him and his correct remedy, in our opinion, is an action against the Company to recover damages due to him for the breach. It may not be so convenient a remedy as an injunction for the plaintiff but he can get redress for any damage done to him by these means, and such a suit will be free from the objections noted above as existing in the case of a temporary injunction.

We think, therefore, that the order of the learned Additional Judicial Commissioner shall be set aside, but only on condition that if the Company chooses to employ other persons all stevedoring bills or bills of operations referred to in the contract submitted by other firms should be preserved in their Karachi Office up to the end of June 1926 and that certified copies of them should be deposited in Court within six weeks of the submission of such bills. If the Steamship Company finds that it is able to do without stevedores and wishes to do that work through their crew or some unlicensed firm, they should apply to the Court for further terms before they do so.

Costs to be costs in the cause.

Rupchand, A. J. C.—I concur. The preventive relief by way of injunction whether perpetual or temporary is within the discretion of the Court depending on the particular circumstences of each case. In order to entitle the plaintiffs to a temporary injunction pending the disposal of the suit, the plaintiffs must make out a *prima facie* strong case in support of the right they claim, and further show that irreparable damage will result to them if the injunction is not granted. The suit is based on an alleged contract of employment pure and simple by which the defendants as employers are said to have agreed to employ the plaintiffs as stevedores and dubashes on all their steamers which touch the Karachi Port between 1st July 1923 and 30th June 1926. The plaintiffs contend that in breach of their agreement the defendants have failed to employ them as stevedores in respect of three of their steamers under the terms of the agreement though they have accepted their services in respect of two of them at rates lower than the agreed rates. They claim damages in respect of the three steamers and ask for an injunction restraining the defendants from employing any other stevedores during the period of their employment.

Our attention has not been drawn to any decided case where an employer has been restrained by an injunction from employing the services of another person during the continuance of an agreement of service. The leading case of *Lumley* v. *Wagner* (1) which has been adopted as illustration (*c*) to s. 57 of the Specific Relief Act is the converse of the present case. In that case a noted German singer who had contracted to sing in the plaintiffs' theatre and not to sing elsewhere during a specified time was enjoined from singing elsewhere. In that case the plaintiffs could not obtain adequate redress in an action at law, and the considerations of expediency which move a Court of Equity to refuse a decree of specific performance of a contract for personal service, were held not to prevent it from granting an injunction to enforce the negative covenant by the defendants not to sing elsewhere.

In his judgment, Lord St. Leonards while

(1) (1852) 91 R. R. 193; 1 D. M & G. 604; 21 L. J. Ch. 898; 19 L. T. (o. s.) 264; 16 Jur. 871; 42 E. R. 687.

confessing that possibly the injunction might have the practical effect of constraining the defendant to fulfil his engagement expressly disclaimed the intention on the part of the Court of doing by indirection what it would not do directly (*i. e.*, decree specific performance) and observed that "wherever this Court has not proper jurisdiction to enforce specific performance it operates to bind men's consciences as far as they can be bound to a true and literal performance of their agreement and it will not suffer them to depart from their contracts at their pleasure leaving the party with whom they have contracted to the mere chance of any damages which a Jury may give".

The case of *Lumley* v. *Wagner* (1) was distinguished in the case of *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (2) where a Railway Company had agreed with the contractors that the latter should work the line, keep the engines and rolling plank in repair for seven years at stipulated amounts of remuneration, with power to the Company to determine the contract by a second notice if within forty-eight hours of a first notice calling upon the contractors to carry out certain repairs they failed to do so. The contractors having failed to carry out certain repairs within forty-eight hours of the notice served on them instituted a suit for a declaration that on a true construction of the contract they could only be required to carry out such repairs as could reasonably be completed within forty-eight hours and for an injunction restraining the Company to give the second notice of termination. While referring to the case of *Lumley* v. *Wagner* (1), Lord Justice Knight Bruce observed: "Mark, however, how the parties were arranged, the plaintiff had only to pay money, but not so the defendant; here the parties are reversed, the defendant's obligations are satisfied by paying money but not so those of plaintiffs", and in the concluding part of his judgment he said as follows:—

"The inconvenience to the defendants not to say the society at large, would be greater if the Court interfered than the not interfering could possibly be to the plaintiffs, because all the plaintiffs require, is money, and if they are entitled to money they will be entitled to recover it in the ordinary course of law. As to reputation I do not see why it should suffer by differing from a particular Railway Company; the reputation of the Railway Company may equally suffer by differing from the plaintiff. If the plaintiffs' reputation does, however, suffer there is a remedy open at law. The application must, therefore, be dismissed." The plaintiffs have an adequate remedy by way of damages, and the ground urged by Mr. Dipchand that the plaintiffs would suffer in their reputation is also sufficiently met by the *dicta* in Johnson's case

In *Chaplin* v. *North Western Railway Co.* (3) an application by the carriers to obtain an injunction against the Railway Company restraining the Railway Company from acting upto their resolution of loading and unloading goods departmentally, and cancelling their engagements with the plaintiffs was dismissed on similar grounds.

Reference may also be made to *Mair* v. *Himalaya, Tea Co.* (4) a contract to act as a manager of a tea estate, *Stocker* v. *Brockelbank* (5) a contract to manage the business of working certain patents, *Nusserwanji Merwanji Panday* v. *Gorden* (6) a contract to act as agents of a Company and *Ram Chandra* v. *Rakhal Das* (7), a contract to act as manager of trust properties which are referred to in Pollock and Mulla's Notes to s. 54, Specific Relief Act, where injunctions were refused to restrain the employers from determining their contracts with their employees where the services to be rendered by the latter were of a personal nature. Section 57 of the Specific Relief Act relied on by the plaintiffs in support of their case is only an enabling section. Though the Court may not issue an injunction to restrain the breach of an affirmative covenant in a contract in view of s. 55 cl. (*f*) of the Act, it is not precluded from enforcing by injunction a negative covenant which is coupled with such affirmative covenant and which is either express or implied.

Whether the Court would enjoin the performance of a negative covenant or would infer the existence of such covenant by implication must again depend on the circumstances of each case. It is not conceivable what equitable grounds can be urged

(2) (1853) 22 L. J. Ch. 921; 3 D. M. & G. 914; 17 Jur. 1015; 98 R. R. 360; 43 E. R. 358.

(3) (1862) 5 L. T. 601.

(4) (1865) 147 R. R. 872; 11 Jur. (N. S.) 1013; 1 Eq. 411; 14 W. R. 165; 13 L. T. (N. S.) 586.

(5) (1851) 87 R. R. 87; 3 Mac. & G. 250; 20 L. J. Ch. 401; 15 Jur. 591; 18 L. T. (O. S.) 177; 42 E. R. 257.

(6) 6 B. 266 at p. 283; 3 Ind. Dec. (N. S.) 634.

(7) 20 Ind. Cas. 157; 41 C. 19; 17 C. W. N. 1045.

for enforcing a negative covenant of an employer in a contract of employment pure and simple where the employee is only entitled to his remuneration.

The cases of *Subba Naidu* v. *Haji Badsha* (8) and *South Indian Export Co.* v. *Subba Naidu* (9) which probably relate to the same mica mines of Subba Naidu a party to both the cases, are distinguishable. They were not contracts of employment pure and simple as the present case. In the first case the plaintiffs-respondents had advanced Rs. 10,000 without interest to the defendant which sum was required by the defendant to work his mica mines and in consideration thereof the defendant had agreed to consign all mica produced in their mines to plaintiff at Madras for sale upon certain terms, and had subsequently executed a mortgage agreement also in their favour. They complained that the defendants had in contravention of the first agreement agreed to consign to another firm mica produced by the use of the capital to another firm, and that under the second mortgage agreement the principal defendants had agreed to liquidate certain loans due by them to the plaintiffs out of the sale-proceeds of mica, and unless they were restrained by an injunction irreparable loss would result to them. The temporary injunction asked for was in respect of 231 cases which had been diverted for sale to another agency. In the latter case again the plaintiffs had agreed to finance the defendants with a standing advance of Rs. 55,000 in consideration of the defendants agreeing to employ a nominee of the plaintiffs as manager to assist in working the mines and had agreed to effect sales jointly with the plaintiffs for a period of five years and to pay to the plaintiffs 5 per cent. commission on such sales.

The plaintiffs were not a Banking Company, but an expert Company of traders. The defendants had some difficulty in working their mines which were valuable, and the consideration of the advance which enabled them to work the mines was the right to part in the management and in effecting the sales. The Court observed that it had been pointed out in some cases that it is for the interest of persons in the position of the defendants that breaches of agreements of this sort should be prevented by an injunction because unless there is that security they will not have the advantage of people entering into such agreements with them.

Reference was *inter alia* made to the case of the *Metropolitan Electric Supply Co., Ltd.* v. *Ginder* (10) and no attempt was made to distinguish the Indian Law from the English Law on this point.

In the agreement in suit, there is no express covenant by the defendants agreeing not to employ anyother stevedores during the stipulated period. Recent English authorities have refused to import in contracts for personal service even in the case of an employee a covenant on his part to serve no other rival employee during the stipulated period: Halsbury's Laws of England, Volume XVII, para. 526, *Mortimer* v. *Beckett* (11) it may possibly be questioned how far these rulings should apply here in view of Illustration (*d*) to s 57, Specific Relief Act. See *Burn & Co.* v. *Colin McDonald* (12). But the case of the employer stands on a different footing. He may be content with paying the fixed remuneration to the employee without requiring his services. The present case is much stronger. It would appear that the parties contemplated that there should be no negative covenant on the part of either. The alleged agreement mentions *inter alia* the following clause:

"Penalty for non-performance on either side estimated amount of ship's bill."

The plaintiffs are not confined to the defendants. It is open to them to neglect or refuse to attend to the defendants' ships and though the defendants may be seriously inconvenienced and may suffer a loss far in excess of the ship's bill, by detention of the ships, their claim is limited to the ship's bill. If the plaintiffs are at liberty to refuse to work for the defendants on payment of a certain amount as damages, it would be inequitable to force the defendants to employ no other agency though they in their turn are prepared to compensate the plaintiffs or to infer by implication a negative covenant in that behalf.

Subject to what the plaintiffs may be able to prove at the hearing it would appear that no *prima facie* case has been made out by the plaintiffs to entitle them to a

(8) 26 M. 168; 13 M. L. J. 13.
(9) 7 Ind. Cas. 243; (1910) M. W. N. 274; 8 M. L. T. 149.
(10) (1901) 2 Ch. 799; 70 L. J. Ch. 862; 84 L. T. 818; 49 W. R. 508; 65 J. P. 519; 17 T. L. R. 435.
(11) (1920) 1 Ch. 571; 89 L. J. Ch. 245; 123 L. T. 27; 64 S. J. 341.
(12) 1 Ind. Cas. 829; 36 C. 354; 13 C. W. N. 255; 9 C. L. J. 190.

decree for an injunction. It would also appear that they have not shown that irreparable loss would result to them by the refusal of the injunction; on the contrary it would appear that the issue of the injunction would work a great hardship on the defendants

Whether the amount fixed in the agreement is by way of penalty or liquidated damages, is a question for the Court to decide at the hearing. Possibly the plaintiffs may suceeed in proving that this sum was the fixed price at which each party bought the right to avoid their liability under the contracts in respect of each shipment and, therefore, not a penalty. Possibly again the defendants may be able to have this sum reduced by the amount saved by the plaintiffs in consequence of the plaintiffs not being required to render their services. The cost of such services would be within their special knowledge of the plaintiffs. They cannot, therefore, experience any difficulty in proving the exact amount of such cost. The plaintiffs have complained that they would have to file separate suits in respect of each shipment of the defendants that comes into the port. It is equally open to them to file one suit for recovery of the amount due to them after the expiry of the stipulated period, or if, they so wish to institute one suit for the estimated amount of theirclaim treating the contract as broken and if the suit comes to trial after the expiry of the stipulated period, as very likely it would, to prove the actual amount to which they are entitled. On the other hand, an injunction would mean compelling the defendants either to divert their ships from this port causing them immense loss and depriving the public use of their ships at this port or to have the services which are of a delicate nature rendered by the plaintiffs who are objectionable to them and in whom they have no confidence, however, estimable they may be, or, however, efficient they may be in their work. The contract provides for work being done by the plaintiffs to the satisfaction of the masters of the steamships of the defendants. The duties of a stevedore are of such a delicate nature that where his relations with the employers are anything but friendly, it would only result in constant quarrels between the plaintiffs and the masters of the defendants' ships to the prejudice of both and lead to further litigation. It may transpire at the hearing that the agreement was not binding on the defendants or that there was no obligation on the defendants to employ the plaintiffs. The defendants would in that case have no remedy whatsoever.

Assuming, therefore, that there is a subsisting and valid agreement between the parties which contains a negative stipulation I am of opinion that it is one which the Court as a Court of Equity is not likely to enforce at the final hearing in the circumstances of this case, and that if the injunction is discharged, it is not likely to cause irreparable loss to the plaintiffs. The injunction issued by the learned Additional Judicial Commissioner should, therefore, be discharged.

Z. K. *Injunction discharged.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2052 OF 1923.

March 25, 1924.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

MUL SINGH—APPLICANT—APPELLANT

versus

RAM SINGH-JAMIAT SINGH AND OTHERS —CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 10—Insolvency, petition for—Debtor unable to pay debts, meaning of.

Where it appears *prima facie* that a petitioner for insolvency is unable to pay his debts his application should not be rejected merely because upon a nice calculation of the value of his assets it might be possible to hold that the value of the assets exceeds the amount of his liabilities.

First appeal from an order of the District Judge, Lyallpur, dated the 15th June 1923.

Mr. *M. L. Puri*, for the Appellant.

Sardar *Jawahar Singh* for Sardar *Kharak Singh*, for the Respondent.

JUDGMENT.

Scott-Smith, J.—This is an appeal from an order of the District Judge of Lyallpur, dismissing an application by Mul Singh to be declared an insolvent on the ground that he is not unable to pay his debts. The amount of liabilities entered in the petitioner's schedule is Rs. 37,000. He has one square of land, and certain other property which is stated to be worth Rs. 6,000. The learned Judge says that the square of land is worth over Rs. 32,000 and that, therefore, the assets exceed the

liabilities. It appears, however, that some of the creditors, who were present, said that the debts due to them exceeded the sums entered by the petitioner in his schedule. If the amount of their debts is as stated by them, then the total liabilities exceed Rs. 40,000, and even taking the market value of the square to be Rs. 32,000, the assets are less than the liabilities. The learned District Judge apparently considers the square to be worth more than Rs. 32,000, because one of the creditors, who was present, offered to buy it for that sum. We are not sure that this offer was a genuine one, but in any case it appears to us *prima facie* that the appellant is not able to pay his debts. Some of the creditors, who were present, offered to accept the square of land owned by the appellant in satisfaction of all the liabilities mentioned in his schedule, but the petitioner refused this. From his refusal the learned District Judge has drawn an inference unfavourable to him. It appears that the petitioner refused partly because he does not consider that he is entitled to sell this square, see his 2nd and 3rd grounds of appeal.

We accept the appeal and, setting aside the order of the learned District Judge, we remand the case to him in order that he may pass an order adjudicating the appellant an insolvent and proceed further in accordance with law. We make no order as to costs.

Z. K. *Case remanded.*

LARORE HIGH COURT.

SECOND CIVIL APPEAL No. 2743 OF 1920.

January 29, 1924.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Harrison.

BHAGWAN SINGH, MINOR, UNDER THE GUARDIANSHIP OF HUKAM SINGH—PLAINTIFF—APPELLANT

versus

KIRPA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift in favour of person not in existence, validity of—Possession, whether necessary—Acceptance of gift—Gift in favour of female—Estate taken.

Under the Hindu Law a gift to a person not in existence is invalid. [p. 327, col. 1.]

Under the Hindu Law delivery of possession is not necessary in order to validate a gift provided that there is acceptance on the part of the donee. [p. 327, col. 2.]

Where a gift of immoveable property is made in favour of a female and the donee is described as "*malik kamil*", she takes an absolute estate in the gifted property. [p. 327, col. 1.]

Second appeal from a decree of the District Judge, Lahore, dated the 23rd August 1920.

Pandit *Sheo Narain*, R. B., and Lala *Hargopal*, for the Appellant.

Lala *Ram Chand Manchanda* and Sardar *Kharak Singh*, for the Respondents.

JUDGMENT.—The material facts of the case out of which the connected Appeals Nos. 2743 and 2747 of 1920 by the plaintiff and No. 2778 of 1920 by Kada Singh etc. defendants, have arisen are as follows:—

On the 21st of May 1903 Sunder Singh of Bhasin, Lahore District, executed a deed of release in favour of his minor son Gurbachan Singh and his wife *Musammat* Basant Kaur under which he gave up to them all his rights in land owned by him in village Bhasin in the Lahore District, and in village Ghazikaka in the Gujranwala District. It was also provided in the deed that the absolute owners of the land in question should be Gurbachan Singh and *Musammat* Basant Kaur or any issue which she might subsequently have by Sundar Singh. Gurbachan Singh died in 1903 and mutation of the land situated in Bhasin was sanctioned in favour of *Musammat* Basant Kuar on the 20th of September 1904. Sometime in 1905 or 1906 *Musmmat* Basant Kuar gave birth to Bhagwan Singh, plaintiff. Between 1904 and 1916 Sundar Singh made 11 alienations of land included in the property referred to in the deed of release. The plaintiff, relying upon this deed, brought the suit out of which these appeals arise for possession of the whole of the land so alienated. The learned District Judge held that under the deed of release Gurbachan Singh and Bhagwan Singh, who was subsequently born, became owners in equal shares of the land. He also held that *Musammat* Basant Kuar had only a life-interest in the land which upon her death in 1911 became extinct. He further held that *Musammat* Basant Kaur inherited a life-estate in Gurbachan Singh's half share and that after her death that share reverted to the donor Sundar Singh. In regard to the deed of release he held that there was really a gift to Gurbachan Singh and *Musammat*

Basant Kuar, but so far as the land at Ghazikaka was concerned it was never acted upon, mutation never having been effected and possession never having been given. He, therefore, gave the plaintiff a decree for half of the Bhasin lands and dismissed the rest of his claim. It should be noted that the plaintiff originally asked an alternative relief that he should be given a declaration that the alienation should not effect his reversionary rights but he subsequently gave up this part of the claim. From the order of the District Judge the plaintiff has filed two appeals. In one he asks for possession of the whole of the Ghazikaka land and in the other for half of the Bhasin land for which the lower Appellate Court has not given him a decree. The third appeal is by Kada Singh and others, alienees, in regard to some of the Bhasin land.

A perusal of the deed of release or the deed of gift, as it really is, shows, that the intention of Sundar Singh was to make a settlement upon his son Gurbachan Singh, upon his wife *Musammat* Basant Kaur and on other sons whom he might have by her. The first point argued by Sardar Kharak Singh on behalf of the defendants-appellants is that a gift to a person not in existence at the time is invalid according to Hindu Law. The authority for this is Art. 295 of Mulla's Principles of Hindu Law, 3rd Edition, and Mayne on Hindu Law, 8th Edition, page 514. This is not seriously disputed by Counsel for the plaintiff and we, therefore, hold that the deed of gift does not confer any rights upon Bhagwan Singh, who was born after its execution. There is no reason, however, why the deed should not be considered valid so far as Gurbachan Singh and *Musammat* Basant Kaur are concerned. It purported to make them absolute owners of the land gifted. The words used are "*malik kamil*" which can have but one interpretation. We, therefore, hold that the learned District Judge is wrong in his view that *Musammat* Basant Kaur received only a life estate under this deed. Lala Hargopal on behalf of the plaintiff contends that it conferred rights of absolute ownership upon Gurbachan Singh and *Musammat* Basant Kaur in equal shares. When Gurbachan Singh died his mother *Musammat* Basant Kuar succeeded to his half share, but in that she had only a life-estate which became extinct the land reverting to her husband Sundar Singh, upon her death in 1911. As regards the half share of which she was the absolute owner under the deed of gift her sole heir is her son Bhagwan Singh, the plaintiff and he is undoubtedly the owner of half the land which was the subject of the gift.

The next question is whether the gift was valid as regards the land in village Ghazikaka. Counsel for the defendants urges that in order to validate a gift under the Hindu Law it is necessary that possession should be given to the donee. Mr. Mula, no doubt, in Art. 294 of his Principles of Hindu Law, 3rd Edition, says that gift under the Hindu Law is not valid unless it is accompanied by delivery of possession but there are various cases in which it has been held that delivery of possession is not necessary, see *inter alia Balmokund* v. *Bhagwan Das* (1), *Joitaram* v. *Nandlal* (2), *Ram Chand* v. *Devi Chand* (3) and *Ram Charan Das* v. *Bhagwati* (4). In the Punjab Law Reporter case it was held that there must be acceptance on the part of the donee. In the present case it is clear that, as pointed out by both the lower Courts, that the gift was fully acted upon as regards the land in village Bhasin, and the power-of-attorney (Ex. P. W.-1) executed by *Musammat* Basant Kaur in favour of Teja Singh *lambardar*, on the 2nd of May 1905 shows that she considered herself the owner of the gifted land situated in Ghazikaka. It is, therefore, clear that she accepted the gift of that land and, having regard to the fact it was situated in another District than that in which the donor lives, we do not attach any importance to the fact that he did not cause mutation of it to be effected in her name. The fact that he subsequently alienated some of this land merely shows that he was dishonest and not that he repudiated the gift. We, therefore, hold that there was a valid gift of the land situated in both the villages.

Having regard to our finding the plaintiff is entitled as the heir of his mother *Musammat* Basant Kaur donee to half the land gifted in both in Bhasin and Ghazikaka villages. We, therefore, dismiss the defendant's Appeal (No. 2743 of 1920) and the plaintiff's Appeal (No. 2747 of 1920). We accept the plaintiff's Appeal (No. 2743 of

(1) 16 A. 185; A. W. N. (1894) 21; 8 Ind. Dec. (N. S.) 119.
(2) 27 B. 31; 4 Bom. L. R. 754.
(2) 21 P. L. R. 1901.
(4) 52 P. R. 1908; 103 P. W. R. 1908.

1920) and in addition to the decree given to him by the lower Appellate Court we give him a decree for half the land claimed by him situate in *Mauza* Ghazikaka. Under the circumstances we leave the parties to bear their own costs in all Courts.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 145 OF 1924.

March 27, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Rankin.

SREELAL MANGTULAL—PLAINTIFFS —APPELLANTS

versus

THE LISTER ANTISEPTIC DRESSING Co., LTD.—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 26, 27, 28—Companies Act (VII of 1913), s. 89—Hundi *endorsed by payee as managing agent of Company—Liability of Company.*

It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. [p. 329, col. 1.]

It is not sufficient that the principal's name should be in some way disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill. [p. 329, cols. 1 & 2.]

A *hundi* was drawn in favour of "M & Sons". It was endorsed by the payee as "M & Sons" and there was a further endorsement upon it as follows :—"M & Sons, Managing Agents L. Co.":

Held, that the words "Managing Agents L. Co.", were merely descriptive of the firm of "M & Sons" and that it would not be clear to any one who took the document that the responsibility of the L. Company was intended to be involved, it might be that by a consideration of the document one person might come to the conclusion that the responsibility of the Company was intended to be involved and another person might come to the conclusion that it was intended that the personal liability of "M & Sons" only was involved and that, therefore, the L. Company could not be held liable on the document. [p. 329, col. 2.]

Appeal against the decision of Mr. Justice Thornhill, dated the 20th June 1924, passed in the exercise of Original Civil Jurisdiction.

Messrs. *S. N. Banerjee, K. P. Khaitan* and *N. C Chatterjee*, for the Appellants.

Sir *Benode Mitter* and Mr. *S. C. Bose*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiff firm, Sreelal Mangtulal, against the judgment of Mr. Justice Thornhil which was delivered on the 20th of June 1924.

The suit was brought under O. XXXVII of the C. P. C. and was based upon five *hundis*, four of which were dated the 19th of May 1922, and one was dated the 23rd of May 1922. In all material respects they were in the same form; and, it will be sufficient if I refer to that which is marked A. It was in these terms: "Calcutta, 19th May 1922. (180) one hundred and eighty days after date without grace I promise to pay to Messrs. Mitter and Sons, or order the sum of rupees five thousand only for value received in cash. Sd. Mrigendra Lal Mitra." That document appears to be in the form of an ordinary promissory-note; but for some reason, which is not apparent at present, it was accepted by Mrigendra Lal Mitra on the face of the document. It was endorsed by the payees, "Mitter and Sons." There was a further endorsement upon it, as follows: "Mitter and Sons, Managing Agents, Lister Antiseptic Co., Ltd."

The suit was brought by the plaintiffs on the allegation that the plaintiffs were holders in the ordinary course for valuable consideration : that the notes were endorsed by Mitter and Sons to the defendant Company and that the latter endorsed them to the plaintiffs : they relied upon the second endorsement, which I have read, as an endorsement by the "Lister Antiseptic Co. Ltd."

The learned Judge came to the conclusion that the documents were not endorsed by or on behalf of the Company, and he held that the words "Managing Agents, Lister Antiseptic Co., Ltd." were descriptive or decorative and that "they do not indicate that the instrument was made or endorsed by or on behalf of the Company."

The material section of the Indian Companies Act, 1913, is s. 89 which provides as follows :—"A Bill of Exchange, *hundi* or promissory-note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a Company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the Company by any person acting under its authority, express or implied."

In this case it has not been suggested that the promissory-note was endorsed in the name of the Company. The allega-

tion put forward on behalf of the plaintiffs was that it had been endorsed by Mitter and Sons on behalf or on account of the Company.

The principle upon which this case must be decided, in my judgment, was stated by Lord Justice Kennedy in the case of *Chapman* v. *Smethurst* (1), which is as follows:—"The proper test to apply in such cases is laid down in Lindley on Companies, 6th Edition, Volume I at page 280, where it is said: 'The question is in every case one of construction: is the bill or note the bill or note of the Company or not? Does it really purport so to be? For, although given for the purposes of the Company, the bill or note may not even purport to bind it. If on the true construction of the instrument the bill or note is the bill or note of the Company, the Company will be liable upon it, and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the Company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not.'"

This principle was also stated by Lord Buckmaster in the case of *Firm of Sadasuk Janki Das* v. *Kishan Pershad* (2). Lord Buckmaster is reported to have said as follows: "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand." The learned Lord proceeded to say: "The instrument, to which reference has been made, which appears on page 99 of Messrs. Iyenger and Adiga's book on Negotiable Instruments, that 'outside evidence is inadmissible on any person as a principal party unless his—the principal party's—name is in some way disclosed in the instrument itself,' is not in itself an adequate statement of the law. It is not sufficient that the principal's name should be 'in some way' disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill."

It is, therefore, a question of construction whether the Company has been made liable by the endorsement which appears on the back of these promissory-notes and which is as follows: "Mitter and Sons, Managing Agents, Lister Antiseptic Co., Ltd."

In my judgment it is possible that any one taking these promissory-notes might infer that the words which appear after the endorsement "Mitter and Sons" were merely descriptive of "the Firm of Mitter and Sons," and it is not clear that the responsibility of the Company would be recognized by any one to whom the documents were transferred.

The only point which, in my judgment, was of any substance was that these documents bore the endorsement "Mitter and Sons" twice: and, it was urged that if the words "Managing Agents, Lister Antiseptic Co., Ltd." were merely descriptive of the Firm of Mitter and Sons there would be no reason for: "Mitter and Sons" endorsing the documents twice. It was urged that if the words, to which I have referred, were intended to be merely descriptive they might have been inserted after the first endorsement which appears upon the promissory-notes.

I am unable to accede to that argument. It seems to me that it would not be clear to any one, who took the documents, that the responsibility of the Company was intended to be involved. It might be that upon consideration of the documents one person might come to the conclusion that the responsibility of the Company was intended to be involved; on the other hand, another person, taking these documents, might come to the opposite conclusion, *viz.*, that it was intended that the personal liability of Messrs. Mitter and Sons only was involved. The endorsement on the documents does not comply with the test laid down by the learned Lord that the "responsibility is made plain and can be instantly recognized as the document passes from hand to hand".

For these reasons, in my judgment, the learned Judge's judgment was correct.

An application was made to the Court for leave to amend the plaint in order to include a claim for money which it was alleged the plaintiffs had advanced to the

(1) (1909) 1 K. B 927; 78 L. J. K. B. 654; 100 L. T. 465; 16 Manson 171; 14 Com. Cas. 94; 53 S. J 340; 25 T. L. R. 383.

(2) 50 Ind. Cas. 216; 46 I. A. 33; 46 C. 663; 23 C. W. N. 937; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 695; 1 U. P. L. R. (P. C.) 37; (1919) M. W. N. 310; 10 L. W. 143 (P. C.).

Company. There was no application at the trial for such an amendment and it is sufficient to say that, in my judgment, it is too late now for the plaintiffs to make that application. There is a further reason that there is not in the plaint sufficient indication as to what, if any, the consideration was. Therefore, in my opinion, the application for amendment should be refused.

The result is that this appeal must be dismissed with costs.

Rankin, J.—I agree.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1039 OF 1920.
EXECUTION APPLICATION No. 168 OF 1925.
April 8, 1925.

Present:—Mr. Kennedy, J. C.

FIRM OF ADAMJI JAFFORJI—
APPLICANTS
versus
FIRM OF BASRIO FADOO—
OPPONENTS.

Insolvency—Interim *Receiver, duties and powers of —Commencement of insolvency, date of—Application for adjudication—Decree obtained by insolvent, attachment of—Money realised in execution, disposal of—Procedure.*

The Provincial Insolvency Act does not precisely lay down the duties and powers of an *interim* Receiver as distinguished from an Official Receiver, but it must be intended that the Receiver *interim* should possess sufficient powers to maintain the estate (which may be about to be administered in insolvency) in such a position, that should the debtor finally be adjudicated, there will be no dilapidation of the estate between the insolvency application and the adjudication order, while at the same time no damage can be allowed to be done to any third person, in case the application of insolvency fails. [p. 330, col. 2.]

The commencement of an insolvency dates from the date of the application for adjudication. [*ibid.*]

When after an application for adjudication is made money is realized and paid into Court in execution of a decree held by the insolvent which has been attached by a creditor of his, the money should be treated as part of the estate of the insolvent and should be kept in Court till the application for adjudication is disposed of. [p. 331, col. 1.]

Application by *Interim* Receiver for money realized in execution against the Insolvent being paid to him.

Mr. *Srikisho Das H. Lulla*, for the Receiver.

Mr. *Javhormal Vilatrai*, for the Attaching Creditor.

ORDER.—In this case Basrio Fudoo brought an action against Adamji Jafferji which action was dismissed with costs. Under the decree, therefore, Adamji Jafferji became entitled to recover a certain amount as costs from Busrio Fudoo. Somewhere before the 12th of February of the current year, that decree was attached by Abdul Hussain. Under that decree a certain sum has been attached and brought in the Court for the benefit of the attaching-creditor, Abdul Hussain.

On the 19th of December 1924 a petition to adjudicate Adamji Jafferji as insolvent was admitted by the Insolvency Court and on the 18th February 1925 the Official Receiver was appointed *interim* Receiver.

The adjudication has not yet taken place. The question is somewhat technical and it is this whether the *interim* Receiver under the Provincial Insolvnecy Act has the same rights as an Official Receiver after the adjudication.

It is perhaps somewhat difficult to extract from the Provincial Insolvency Act what precisely the duties and powers of the *interim* Receiver as distinguished from an Official Receiver are inasmuch as we are referred in general to O. XL of the C. P. C. But I take it that it must be intended that the *interim* Receiver should possess sufficient powers to maintain the estate (which may be about to be administered in insolvency) in such a position, that should the debtor finally be adjudicated, there will be no dilapidation of the estate in the interval between the insolvency application and the adjudication order, while at the same time no damage can be allowed to be done to any third person, in case the application for insolvency fails.

It is pointed out that the Receiver contemplated by ss. 50 and 51 of the Provincial Insolvency Act is not an *interim* Receiver and that it is impossible to suppose that the appointment of an *interim* Receiver was intended to have so far reaching effect on the estate when it is considered that the debtor after all may not prove insolvent. But it is not necessary to suppose that the *interim* Receiver would be vested with such special powers beyond these necessary to protect the estate of the insolvent in the *interim*.

It is to the date of the application that we are to look as the commencement of in-

solvency and not to the date of the appointment of the Receiver. And in this case, the application was made long before the application of Abdul Hussain for attachment, and, therefore, the property of the debtor should be kept in the same state in which it was on the 19th of December when the application was made, till it is known whether there is to be adjudication or not. Now, no doubt, had there been an *interim* Receiver appointed before the attachment of the decree held by Adamji Jafferji, that part of the property of Adamji Jafferji, namely, his claim under the decree, could not have been attached by his creditor without the leave of the Court and, therefore, if the decree was to be executed at all, it could only be executed by the *interim* Receiver who could move the Original Court according to the fate of the order of adjudication. It would, therefore, in accordance with the spirit of the Insolvency Act, be proper to direct that things do remain as they are and that the money now paid in under the attached decree be treated as still being the part of the estate of the insolvent, as it stood on the date of the application, being in fact merely a change from amouut claimed to an amount realized, and it ought, therefore, I think, be kept in Court without being paid out to the attaching-creditor until the fate of the adjudication order is known.

I do not think that the attaching-creditor would be damnified by this order because assuming Adamji Jafferji was ultimately adjudicated insolvent and the Official Receiver were appointed, then he would be ordered to re-pay the full amount to the Official Receiver. If, on the other hand, there is no adjudication, he will be entitled to withdraw this amount in full unless unforeseen difficulties occur. Inasmuch as under s. 73, C. P. C, applications for rateable distribution could only lie when execution applications have been made before the realization of the assets by the Court, therefore, no subsequent applications, which may be made while the amount is kept in Court, will diminish the amount realizable by the present attachment-creditor, should there be no adjudication.

The difficulty is that the attaching-creditor would be out of the use of his money for some time, but I hope that can be remedied by speedy disposal of the insolvency application. Should there be any delay in the disposal of the insolvency application then he may move the Insolvency Court to be allowed to recover the money on giving security.

P. B. A. *Order accordingly.*
Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. NIL OF 1925.
March 31, 1925.
Present:—Mr. Findlay, O. J. C.

SHANKAR RAO AND OTHERS—PLAINTIFFS —APPELLANTS
versus
RAGHUNATHRAO—DEFENDANT No. 7—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. I, r. 10 (2)—Order discharging defendant, whether decree—Appeal, whether lies.

An order passed under O. I, r. 10 (2) of the C. P. C. discharging a defendant from the suit cannot be regarded as falling within the definition of a "decree" in s. 2 (2) of the Code and as such no appeal lies from it. [p. 332, col. 1.]

The mere drawing up of a formal decree cannot *ipso facto* make the corresponding order an appealable one, if it does not in itself really fall within the definition of a decree. [p. 331, col. 2.]

Appeal against a decree of the Additional District Judge, Nagpur, dated 30th October 1924, in Civil Appeal No. 78 of 1924.

Mr. *M. R. Bobde*, for the Appellant.
Mr. *G. N. Bose*, R. B., for the Respondent.

JUDGMENT.—The only question, I am concerned with at present, is whether an appeal lies or not in the present case. The order of the Subordinate Judge was passed on the 19th of February 1924, discharging the defendant-respondent Raghunathrao from the suit under circumstances which are clear from that order. After the order had been passed, the plaintiffs applied for a decree of dismissal to be formulated against defendant No. 7, so that they might be able to appeal against the said order, and the Subordinate Judge, in due course, did pass such a decree.

In the first place, I would point out, with reference to the definition of "decree" in s. 2 (2) of the C. P. C., that the mere drawing up of a formal decree would not *ipso facto* make the corresponding order an appealable one, if it were not, in itself, really such within the definition referred to above; *cf. Pandurang* v. *Gayabai* (1).

(1) 62 Ind. Cas. 467; 17 N. L. R. 66.

In support of the proposition taken up by present plaintiffs-appellants I have been referred to the decision in *Gangadhara Rama Rao* v. *Durya Rao* (2). It was therein held that the striking out of the defendant's name on the ground that the plaint disclosed no cause of action against him, was an order which fell within the definition of a "decree" and was appealable as such.

For my own part, with all respect, I am unable to concur in the Madras decision just quoted. The word "order" in O. I, r. 10 (2), C. P. C., would seem to me to be advisedly used, and no appeal lies under the Code from an order so passed. I cannot, therefore, see how such an order can be regarded as falling within the definition of a "decree" in s. 2 (2) of the Code, and it seems to be a dangerous straining of terminology to hold that such an order is a "formal expression of an adjudication which conclusively determines the rights of the parties with regard to the matters in controversy in the suit." I concur, therefore, with the Judge of the lower Appellate Court in thinking that no appeal lies in this case.

Counsel for the Appellants has asked me in that event to treat the present appeal as an application for revision. But this also I see no cause to allow. When, if at all, the plaintiff's appeal against the final judgment and decree in the suit, it will be open to them to object therein under s. 105, C. P. C, to the fact of the present respondent having been dismissed from the suit. The appeal is rejected.

Z. K. *Appeal rejected.*

(2) 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 67 OF 1924.

March 19, 1925.

Present:—Mr. Dalal, A. J. C.

RAM HARAKH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SALIK RAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 97—Mortgage, simple—Possession taken by mortgagee—Dispossession—Suit to recover mortgage-money—Limitation, commencement of.

Under a simple mortgage the mortgagee was entitled under certain circumstances to take possession of the mortgaged property. The mortgagee took possession of the property but was subsequently dispossessed therefrom. He thereupon brought a suit to recover the amount of the mortgage-money from his mortgagor. It was contended that the mortgage was of joint family property and being unsupported by legal necessity was void and also that the suit was barred by time:

Held, (1) that even if the mortgage was void the mortgagee having got possession of the mortgaged property had an existing consideration for his mortgage and that it only failed when the mortgagee was finally dispossessed of the property; [p. 333, col. 1]

(2) that the suit was, therefore, maintainable and limitation began to run from the date of the dispossession under Art. 97 of Sch. I to the Limitation Act. [*ibid.*]

Second appeal against a decree of the Subordinate Judge, Sultanpur, dated the 12th November 1923, reversing that of the Munsif, Musafirkhana, dated the 27th February 1923.

Mr. *Haider Husain*, for the Appellants.

JUDGMENT.—It is to be regretted that the defendant Salik Ram is not represented. He is present in person and says that he has no money, so possibly he hopes that on a money-decree being passed against him the plaintiffs would get nothing for their trouble.

The plaintiffs sued for a money-decree on the basis of two mortgage-deeds one of 9th August 1907 and the second of a further charge of 10th August 1909. The mortgages were simple but on certain conditions failing, the mortgagee was entitled to take possession of the mortgaged property.

What the mortgagee said was that he did take possession of the six plots of land mortgaged but subsequently the defendant took forcible possession of some of the plots till finally only one plot No. 2313 of 7 *biswas* out of 42 *biswas* mortgeged land remained in the mortgagees's possession. From this plot also the mortgagee was dispossessed in 1329 *Fasli* corresponding to 1921 A. D. The position taken up by the mortgagee was that this consideration failed in 1921 and he sued for a money-decree on 14th August 1922.

The learned Munsif in a judgment of considerable capacity held the suit to be within time. Beyond the plaint allegation the Court pointed out that in the *khasra* of 1325 *Fasli* the mortgagee was shown in possession of plot No. 2313, so if the period of limitation was to be counted from the mortgagee's dispossession from that land

the suit was within time, even if the mortgagee be considered to have been dispossessed in 1325 *Fasli*.

The judgment of the lower Appellate Court is considerably confused. There was before that Court the very clear judgment of the Munsif but possibly it was not carefully perused. The Munsif gave his opinion that limitation was governed by Art. 97 for money paid upon an existing consideration which afterwards failed and that the date of failure was the ejectment of the mortgagee from the last plot of land No. 2313 at the earliest in 1325 *Fasli*. This opinion is no way met by the learned Subordinate Judge of the lower Appellate Court. In a confused way that Judge has stated that whether Art. 97 or Art. 116 applied the suit for simple money-decree seemed clearly barred by time. The matter may have been clear to his mind but there being no statement in the judgment as to how the matter was so clear to him it is not clear to my mind at all. If Art. 97 applied, and as the Munsif pointed out the cause of action accrued when the mortgagee was ejected from the last plot of mortgaged land, it cannot be said that the suit was barred by limitation.

The question for decision is whether the suit is so barred. It is argued on behalf of the mortgagee-appellant that the consideration failed when the mortgagee was dispossessed though the mortgage being made by the manager of a joint family of ancestral property without legal necessity was void. As already stated this Court is handicapped by the non-appearance of any Counsel on behalf of the respondent, but I do not see how this argument which is succinctly stated in the judgment of the Munsif can be repelled. Even though the mortgage was void the mortgagee having got possession had an existing consideration for his mortgage and it only failed when the mortgagee was finally dispossessed. The reference to the ruling: *Gajadhar Bakhsh* v. *Gauri Shankar* (1) in the lower Court's judgment is not applicable. The Munsif has shown in his judgment how the ruling was inapplicable but the lower Appellate Court has not met the arguments of the Trial Court. I agree with the Trial Court that the ruling referred to must be confined to a case of simple mortgage where there had been no subsequent possession as security for the mortgage.

(1) 61 Ind. Cas. 205; 8 O. L. J. 81.

I agree with the Munsif that the suit is within time, restore his decree and set aside the decree of the lower Appellate Court with costs of all the Courts.

Z. K. *Decree set aside.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 3164 OF 1918.

January 23, 1924.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

TULSI RAM—DEFENDANT—APPELLANT

versus

Mehta DINA NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partnership, dissolution of—Partnership for fixed term, whether can be dissolved before expiry of term—Suit instituted before expiry of term—Expiry of term during pendency of suit—Suit, whether premature—Insolvency of plaintiff—Suit, whether can be continued—Civil Procedure Code (Act V of 1908), O. XXVI, r. 11—Commission, issue of—Court, whether can delegate its functions of Commissioner.

Even when a partnership is entered into for a fixed term a decree for dissolution may be passed when the mutual confidence which the partners reposed in each other at the time when the partnership was entered into has ceased. [p. 334, col. 2.]

Where a suit is instituted for dissolution of a partnership at a time when the partnership cannot be dissolved but during the pendency of the suit the partnership becomes liable to dissolution, the suit cannot be dismissed as premature inasmuch as the initial defect has been removed during the pendency of the suit. [*ibid.*]

Where a plaintiff is adjudicated an insolvent during the pendency of the suit, the suit cannot be continued except at the instance of the Receiver. [*ibid.*]

A Court has no power to make over the whole case to a Commissioner and to delegate its functions in the matter of taking evidence and determining issues to him. [p. 335, col. 1.]

Appeal from a decree of the Subordinate Judge, Kulu.

Mr. *Mehr Chand Mahajan*, for the Appellant.

Lala *Jagan Nath*, Lala *Madan Gopal* for Lala *Faqir Chand* and Mr. *J. N. Bhandari*, for the Respondents.

JUDGMENT.—This is an appeal from a decree passed by the Subordinate Judge at Kulu, a Sub-Division of the Kangra Distrtct in a suit for dissolution of partnership and rendition of accounts. The partnership business consisted in extracting timber from forests in Kulu which had been leased by the Government to the plaintiff, floating it

down the river Beas to Wazir Bullar, and there selling it. The plaintiff took into partnership the first defendant Salig Ram on the 12th August 1910 and the second defendant Tulsi Ram, on the 10th January 1913. There was an agreement made by the plaintiff with Tulsi Ram in 1911, but it appears that that was not acted upon. On the 18th January 1914 Salig Ram entered into an agreement with Tulsi Ram in respect of trees purchased by the former in certain forests.

The plaintiff alleged that he had borne most of the expense incurred in the business and that the defendants had sold some of the timber without consulting him and misappropriated the price. The defendants denied these allegations and said that the plaintiff had not supplied money as he had agreed to do. Salig Ram pleaded that the plaintiff had sold the timber of the first and second *ghals* or floats and realised the price, and Tulsi Ram pleaded that all the timber which had been sold was sold in consultation with the plaintiff and his agent and that as some of the timber had not yet been sold the suit was premature.

The Subordinate Judge on the 24th December 1915 framed certain issues and appointed a Commissioner to take accounts and report on all the issues. Afterwards various other persons were appointed Commissioners at different times. The persons finally appointed were Brahma Nand and Ram Chand, who examined witnesses and ultimately in December 1917 made two divergent reports, the former finding that large sums of money were due from Tulsi Ram to the plaintiff and Salig Ram and the latter that the plaintiff and Salig Ram were in debt to Tulsi Ram. In September 1918 the Subordinate Judge gave his judgment, which he divided into two parts. In the first part he determined the shares of the parties and passed a preliminary decree, directing that the partnership should stand dissolved from the 18th March 1915, the date on which the Court had attached the timber at Dehra ; and in the second part he went into the matter of the accounts, and agreeing in the main with the report of Brahma Nand he passed a decree against Tulsi Ram in favour of Salig Ram for Rs. 9,129 and in favour of the plaintiff for Rs. 20,869, of which amount Salig Ram was to be entitled to recover Rs. 6,446, due to him in respect of the first two floats. The Subordinate Judge also allowed interest on the sums declared at the rate of one per cent. per mensem Tulsi Ram has appealed to this Court.

One contention advanced on behalf of the appellant is that the suit is premature, on the ground that the partnership was one for a fixed term as it was to continue until all the timber was sold, and that, therefore, the suit would not lie so long as some of the timber remained unsold. [But even when a partnership is entered into for a fixed term a decree for dissolution may be passed when the mutual confidence which the partners reposed in each other at the time when the partnership was entered into has ceased (see Lindley on Partnership, 8th Edition, page 657). Moreover, even if the suit was instituted prematurely, this would not be a sufficient ground for dismissing it at this stage, as the remaining timber was sold during the pendency of the suit, the initial defect being thus removed.]

A second contention is that the suit is bad for multifariousness as it includes claim for accounts in respect of timber comprised in three *ghals* or floats in two of which the appellant was not a partner. Without going into the merits of this contention it is sufficient to say that it is too late for the appellant to raise it now, not having set up the plea in the lower Court. It is argued on his behalf that the words " misjoinder of parties or causes of action " in s. 99 of the C. P. C. do not apply to a case in which there is a misjoinder both of parties and of causes of action but we do not agree with the argument. Those words did not occur in the corresponding section of the old Code, and the rulings under that Code which have been cited before us are, therefore, inapplicable. We are also unable to agree with the misjoinder, if any has affected the merits of the case.

It is next urged that the plaintiff was adjudicated an insolvent during the pendency of the suit, and that the suit could not be continued except at the instance of the Receiver. This contention is correct, and it will be necessary to ascertain whether the Receiver wishes to continue the suit. This will be done by the lower Court, to whom we think the case must be remanded in view of the fact, which has been strongly pressed before us, that the trial of the suit has been left in the hands of the Commissioners appointed by the lower Court.

No evidence at all was taken by the Court and the records consist of reports of various Commissioners, evidence taken by them and objections of the parties to the reports. The lower Court was competent to issue a Commission for the examination of the accounts but the case is not one which can be decided solely on the result of such an examination. There are various points in controversy which have to be determined by the Court on evidence, and the Subordinate Judge had no power to make over the whole case to the Commissioners and to delegate his functions in the matter of taking evidence and determining issues to them. In this connection we may refer to a case recently decided by this Court, namely, *Sawan Mal* v. *Raunaq Mal* (1). There has been no trial of the case by the lower Court in the manner required by law, and there, must, therefore, be a re-trial.

The parties do not live in Kulu and we think that it would be more convenient if the case were tried at Dharmsala the headquarters of the Kangra District, where assistance of Counsel can be obtained, than in Kulu. We accept the appeal, set aside the decree of the lower Court, and direct that the suit be re-tried by the Senior Subordinate Judge of Dharmsala. The Court-fee paid on the memorandum of appeal will be refunded and other costs will be costs in the case.

Appeal accepted;
Re-trial ordered.

Z. K.

(1) 68 Ind. Cas. 802; 3 L. 209; (1922) A. I. R. (L.) 47.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 12 OF 1924.

May 8, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

DEOMAL AND ANOTHER—APPLICANTS

versus

KHANOOMAL JOTHMAL—OPPONENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 17—Arbitration, reference to, during pendency of suit—Agreement, whether can be filed—Dispute decided by Court—Jurisdiction of arbitrators.

Where a dispute is referred to arbitration during the pendency of a suit but is subsequently decided by the Court itself, the arbitrator has no jurisdiction to proceed with the arbitration and any award made by the arbitrator under these circumstances cannot be enforced. The only remedy which the aggrieved party can have in such a case is to sue for damages for breach of the contract to abide by the award. [p. 336, col. 1.]

Parties to a suit cannot have an agreement to refer to arbitration disputes in a pending suit filed under para. 17 of Sch. II to the C. P. C. The mere fact that the reference includes certain disputes which are not the subject-matter of the suit will not enable the parties to have the agreement filed. [p. 336, cols. 1 & 2.]

Application to revise the judgment of the Subordinate Judge, Mehar, dated the 10th October 1923, in Suit No. 814 of 1919.

Mr. *Tahilram Maniram*, for the Applicants.

Mr. *Kimatrai Bhojraj*, for the Opponents.

JUDGMENT.—This is an application under s. 115 of the C. P. C. for the revision of the judgment of the learned Sub-Judge, Mehar, dismissing certain objections to an award for default and ordering the award of the arbitrators to be filed and a decree passed in accordance therewith.

In 1918 the opponent filed a suit against applicant in the Court of the learned Sub-Judge, Mehar, for the recovery of ornaments valued at Rs. 700 and 100 sovereigns.

On 7th April 1919 the subject-matter of the dispute in the suit and another dispute relating to the account between the parties were referred to arbitration. An application was subsequently made under para. 17, Sch. II, C. P. C., to file the reference and make it a rule of the Court.

This was granted and the arbitrators were ordered to submit their award on 15th April 1919. Extensions were granted but on 20th January 1920 the learned Sub-Judge refused to grant any further extension and the reference was superseded.

On the 25th June 1920 the Assistant Judge, Sukkur, reversed the decree of the learned Sub-Judge and granted time to the arbitrators to make the award.

Against the decision of the Assistant Judge, Sukkur, a revision application was filed in the High Court.

The learned Sub-Judge, Mehar, meanwhile proceeded with the suit and on December 21st, 1921, the suit was dismissed.

On 28th October 1922 the High Court confirmed the order of the learned Assistant Judge, Sukkur. On the 24th June 1923 the arbitrators made an award. Rupees 700 were awarded to the plaintiffs from defendant No. 1 on account of the ornaments together with interest at 8 annas per cent.

per mensem from 22nd June 1919 until recovery. Plaintiff's claim as regards the sovereigns was rejected. Rupees 855-15-6 were awarded to plaintiff from defendant No. 1 with reference to the accounts together with interest at 8 annas per cent. per mensem from 3rd June 1923 until realization. On the 25th June 1923 the defendants-applicants filed objections in the Court of the learned Sub-Judge, Mehar, pointing out, *inter alia*, that the Court had on 21st December 1919 dismissed the suit relating to the ornaments with costs and that the arbitrators had no authority to adjudicate on that dispute.

On the 10th October 1923 the learned Sub-Judge passed the following order:

"Plaintiff is present. Defendant is not present in person or by Pleader. There is no proof. Let the award be filed and the decree passed in accordance thereunto."

Against this order the defendants have appealed. I am of opinion on the facts above mentioned that the arbitrators had no authority to make the award which they did, so far as the matters in the suit were concerned after they had been decided by the Court.

The Courts, as Fletcher Moulton Lord Justice pointed out in *Doleman & Sons* v. *Ossett Corporation* (1), will not allow their jurisdiction to be ousted.

There being no order for the stay of the suit pending before the learned Sub-Judge, Mehar, there was nothing to prevent him from proceeding with the suit and when the plaintifis' claim in respect of the ornaments and sovereigns was dismissed there was nothing left for the arbitrators to decide, so far as these claims were concerned.

Even had the judgment of the learned Sub-Judge been referred and thearbitrators passed an award to the effect that it was erroneous and improperly obtained, the award could not have had the effect of annulling the judgment, the only remedy which a party would have against a party enforcing the judgment would be a suit for damages for breach of the contract to abide by the award; *Barry* v. *Grogan* (2).

But apart from this a Full Bench of this Court in *Haji Umar* v. *Shivaldas* (3) has held that parties cannot have an agreement to refer to arbitration disputes in a pending suit filed under para. 17 of the Second Schedule of the C. P. C. It follows that the reference itself so far as the disputes involved in the pending suit were concerned was bad irrespective of the fact that the Court decided the disputes before the award was made. Other disputes, no doubt, were included in the reference, but if parties can not under para. 17 refer disputes in the pending suit in order that the jurisdiction of the Court may not be ousted and an unseemly *race ensue* between the Court and the arbitrators, it appears to follow that such disputes cannot be referred under para. 17 in conjunction with other disputes.

A part of the award, therefore, was upon a matter which was not validly referred and the amount of Rs. 700 awarded, included compensation for the incomplete well work and the different accounts, therefore, cannot be separated by us. We set aside the decree and direct the lower Court to remit the award to the arbitrators under para. 14 (*a*), Sch. II, for the elimination of matter not referred. No order as to costs.

Z. K. *Application allowed.*

(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.
(2) (1868) 16 W. R. 727 (Eng.)
(3) 81 Ind. Cas. 653; 16 S. L. R. 174.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 114 OF 1923.

November 18, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

T. D. KUMAR AND BROTHERS—PLAINTIFFS —APPELLANTS

versus

BERUCK AND COMENS—DEFENDANTS —RESPONDENTS.

C. I. F. *contract—Duty of vendor—Documents not delivered to purchaser—Short delivery—Liability of vendor.*

Under a *C. I. F.* contract it is the duty of the vendor to tender to the purchaser the documents, which include the contract of affreightment, the insurance policy and invoice. Where this is done and there is a shortage in the delivery, the purchaser would have his remedy either against the ship or against the Insurance Company as the case might be, but he would have no claim for goods which have not been landed against the vendor. Where, however, instead of delivering to the purchaser the necessary documents under a *C. I. F.* contract the vendor merely gives him a delivery order for specific quantities of goods and the specified quantities are not delivered to

the purchaser, the vendor is liable to the purchaser in respect of the goods which are not landed. [p. 337, col. 2; p. 338, col. 2.]

Appeal against a decree of Mr. Justice Pearson, dated the 18th June 1923.

Messrs. *B. K. Ghose* and *S. N. Sircar*, for the Appellants.

Messrs. *T Ameer Ali* and *R. C. Banerjee*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiffs in the suit against the judgment of my learned brother Mr. Justice Pearson, which was delivered on the 18th of June 1923, and by which he dismissed the suit with costs on scale No. 2.

There were two contracts made between the plaintiffs and the defendants with reference to steel plates.

The present dispute relates to the contract made on the 26th June 1920, whereby the plaintiffs bought from the defendants about 15 tons of mild steel flats—100 bundles (of which the sizes were given) and, 607 bars, (of which the sizes were given). The price was at Rs. 15-8-0 per cwt. *C. I. F.* Calcutta per SS. *Schieldijk*—cash on delivery, which was to be given and taken as follows—Cash against shipping documents on arrival of the steamer.

The other contract was made on the same day, and it related to mild steel rounds. The plaintiffs obtained delivery of the subject-matter of that contract, and, there is no claim in this suit in respect thereof. It is only necessary to refer to it on account of the way in which the delivery was dealt with by the parties.

The steamship arrived in Calcutta on the 9th of August 1920. It appears that the defendants' vendors had drawn bills on the defendants in respect of these goods and the bills had been discounted by the Mercantile Bank. The defendants on the 23rd July 1920 wrote to the plaintiffs as follows:

"Contract Nos. 1964, 1965 of 26th June 1920.

M. S. Bars ex. SS. *Schieldijk*.

"We would refer you to our letter of the 7th July handing you copies of our bills for material purchased by you under the above contracts and we beg to remind you that the steamer is due in port about the end of the month. We trust you are, therefore, making the necessary arrangements for payment to the Mercantile Bank who will deliver you relative documents for the goods. Failure to do this will probably result in wharfage and other miscellaneous charges being incurred for which you will be wholly responsible as per terms of the above contracts but we hope you will preclude any possibility of this by meeting your obligation in due time."

On the 2nd of August the defendants wrote again to the plaintiffs stating that the steamship had been entered at the Custom House and that the plaintiffs in their interests should file their papers there without delay.

The procedure suggested by the defendants in the letter of the 23rd of July, was not strictly in accordance with the terms of the contract but nothing turns upon that in this appeal, because the plaintiffs took no objection to the procedure.

In respect of these contracts they paid Rs. 5,000, on account. They obtained a delivery order in respect of the rounds given by the Bank and directed to Cox's Shipping Agency and by reason of that delivery order, they obtained delivery of the steel rounds.

There was some little delay in the payment of the amount due in respect of the contract, which is now under discussion. On the 21st of August 1920, however, a sum of Rs. 4,711 was paid in respect of the steel flats to the defendants direct, so that on or about the 21st of August the plaintiffs had paid all that was due from them to the defendants in respect of these two contracts.

The contract was a *C. I. F.* contract as I have already mentioned. The rights and duties of the parties under *C. I. F.* contracts are well-known: and it is not necessary for me to mention them in detail. It is sufficient to refer to the case of *Madhoram Hurdeodas* v. *G. C. Sett* (1), where the late Mr. Justice Mookerjee and I re-stated the well-known incidents of such a contract.

Under the contract it was the duty of the defendants to tender the documents, which would include the contract of affreightment, insurance policy and invoice to the plaintiffs. That was not done as far as I can understand the facts of this case, which have not been too clearly proved, the plaintiffs never got the Bill of Lading in respect of this consignment : and, it has not been shown that they ever got the Policy of Insurance.

The procedure which was adopted apparently with the consent of both parties was that the Bank gave a delivery order in

(1) 40 Ind. Cas. 383; 45 C. 28; 21 C. W. N. 670; 26 C. L. J. 62.

respect of the steel flats, in the same way as was done in respect of the steel rounds, directed to Cox's Shipping Agency, and the delivery order specified the goods as follows, "Ends white 607, Calcutta 100; 707, in all." These figures corresponded with the figures mentioned in the contract.

As far as I can ascertain from the evidence which is before us the landing of these particular goods was finished on or about the 6th of September 1920. One would have expected that Messrs. Cox's Shipping Agency would have delivered the goods, to the plaintiffs, and, I cannot see any reason why the plaintiffs should not have obtained delivery on payment of such charges as Messrs. Cox's Shipping Agency were entitled to make. The defendants had received their money; the drafts held by the Bank had been met and the Bank had given a delivery order for the delivery of these goods. However, delivery was not obtained by the plaintiffs, and I am entirely unable to come to any conclusion upon the meagre evidence in this case upon the question as to who was really responsible, for the delay in the delivery. It may have been the plaintiffs or it may have been the defendants—I am not able to express any opinion upon that question.

The fact remains that the goods were put into the Bonded Warehouse and the Secretary of the Bonded Warehouse Association on the 7th December 1920 signed a warrant certifying that the goods in question were held in the Bonded Warehouse. That warrant is dated the 6th of September, which I suppose is the date when the goods were put into the warehouse and the certificate was signed on the 7th of December. The certificate was to the effect that the Mercantile Bank of India Ltd. had deposited the goods and the certificate apparently was sent to the Bank.

There is another fact which is material to this case. It appears that the warrant was endorsed by the Bank to the defendants and endorsed by the defendants to the plaintiffs on or about the 22nd December, 1921, so that more than a year had elapsed since the goods were put into the Bonded Warehouse. When that warrant was endorsed in favour of the plaintiffs. it appears that the Manager of the plaintiffs went and inspected the goods in question. His evidence was that the goods were not in accordance with the contract. In the first place it was alleged that they were not of the sizes specified in the contract and the marks were not in accordance with the contract and, further than that, instead of there being something like 15 tons, he said that he saw not more than $1\frac{1}{2}$ tons. Learned Counsel for the appellants has stated in the course of his argument that if the goods had been found in December 1921 in accordance with the contract the plaintiffs would have accepted them and, consequently, in my judgment, the main question in this case is whether the plaintiffs have proved that the goods which were carried to Calcutta and placed in the Bonded Warehouse were not a sufficient compliance with the contract.

As regards the quantity, in my judgment, there is really no doubt that there was a short delivery of about 198 pieces or bundles. It has been agreed that the money equivalent in respect of the goods short landed is Rs. 1,310 and, the first question which it is necessary for us to decide, is whether the plaintiffs are entitled to recover in respect of the goods which were short landed.

It seems to me that if the defendants had carried out their undertaking under the *C. I. F.* contract completely the plaintiffs would not have had any claim for the goods which had not been landed. The reason is that if the defendants had delivered the necessary documents to the plaintiffs, the plaintiffs would have been in receipt of the Policy of Insurance, the Bill of Lading and the invoice, and if there had been a shortage in the delivery the plaintiffs would have had their remedy either against the ship or against the Insurance Company as the case might be.

The contract, however, was not carried out in the ordinary way and all that the defendants gave to the plaintiffs was a delivery order addressed to Cox's Shipping Agency for specific quantities of goods and the specified quantities were not delivered to the plaintiffs. Under these circumstances, I am of opinion that the plaintiffs are entitled to succeed in this suit in respect of the goods which were not landed.

Then the only other part of the case which requires consideration, in my judgment, is whether the plaintiffs have proved that the goods which were in fact landed were not in accordance with the contract. The learned Judge has dealt with this matter in a few sentences. He said "The complaint that the goods were not according to contract is based on what plaintiff

says he found on inspection some 18 months after the goods arrived when he should have taken the shipping documents. Assuming it were so, I think his objection comes far too late : but in any case I think the evidence of the broker Mookerjee may be accepted that he inspected the goods while they were being landed and found them according to invoice." My learned brother pointed out during the course of the argument that the broker Mr. Mookerjee who gave evidence for the defendants and the plaintiffs' manager who gave evidence for the plaintiffs were given evidence in May 1923, the plaintiffs' manager speaking about the inspection which he had made in December 1921, and the broker Mr. Mookerjee, giving evidence of inspection which he had made in September 1920. Neither of these gentlemen had any note in connection therewith to which he might refer for the purpose of refreshing his memory and, speaking for myself I am of opinion that such evidence is very unsatisfactory in a case of this kind.

Although I am not prepared to go so far as the learned Judge and to say that I accept the evidence of the broker Mr. Mookerjee, I am by no means satisfied that the plaintiffs have proved beyond reasonable doubt that the goods, which were in fact landed, were not in accordance with the terms of the contract. Consequently, in my judgment, that part of the appeal fails. In my opinion, therefore, the appeal ought to succeed to the extent that there should be a decree entered for the plaintiffs for the sum of Rs. 1,310.

(After dicussion)

In this Court the parties will bear their own costs and my reason for that conclusion is that the appellants have succeeded as to a part of the appeal and failed as to the other part. As regards the costs in the Court of first instance we direct that the plaintiffs do get the general costs of the suit and one day's hearing.

Buckland, J.—As we are modifying the judgment and decree of my learned brother Mr. Justice Pearson I desire to make a few observations.

The case as it has, now been presented to us falls under two heads— that of short landing and that of the condition of the goods in respect of marks and sizes. A considerable amount of argument has been directed to the question of delay, but in the very unsatisfactory state of the evidence it is impossible to find any clear reason either why the appellant did not press the defendants to deliver the goods or, on the other hand, why the defendants were themselves not more active in giving delivery and thereby discharging their obligations under this contract ; for, I should have thought that from the point of view of either party it would have been to their interest to see that the transaction was terminated. But, as I have observed, it is impossible to arrive at any clear explanation for the action or inaction of either party

We are, however, left with a few definite facts:—short delivery is based upon documentary evidence and in the judgment of my learned brother it is stated that the plaintiffs made a claim for refund of duty on goods short landed and received Rs. 18-11-0 on that account. I do not think there can be any question, though the fact has been disputed in this Court, that there was a short delivery to the extent of about 198 pieces and to that extent the appellants are entitled to some relief. The point is not one which my learned brother dealt with at the trial and it may be that it was not given the same prominence as it has been given here.

The position with regard to the sum which we propose to allow appears to me to be this: As has been pointed out by the learned Chief Justice, the original duty of the defendants was to deliver the proper documents under a *C. I. F.* contract. That was not done because it appears that the appellants were willing to accept a delivery order instead, and did so in lieu of the documents which otherwise it would have been the duty of the defendants to offer them. Had the defendants delivered the documents which it ordinarily would have been their duty to offer them, the plaintiffs would have their claim, as has been pointed out, either against the ship or against Insurance Company but by accepting the delivery order they abandoned their right to proceed against other persons for short delivery. In consideration, the defendants must be taken to have agreed to deliver the full quantity specified and to be responsible for any shortage. That they have not done ; and, to that extent they ought to pay compensation to the appellants. That disposes of a portion of the claim.

As regards the claim based upon goods

not being in accordance with the contract as regards marks and sizes I agree with the observations of my Lord and have nothing to add.

Z. K. *Appeal partly allowed; Decree modified.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 610 OF 1922.

April 21, 1925.

Present:—Mr. Justice Kulwant Sahay.

PALLAKDHARI THAKUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BANKEY THAKUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 184, Sch. III, Art. 3—Limitation Act (IX of 1908), s. 3—Occupancy tenant—Dispossession at instance of landlord—Suit to recover possession of holding—Limitation—Plea of limitation raised but not pressed in Trial Court—Appeal—Appellate Court, whether can entertain plea.

Where an occupancy tenant has been ousted from his holding and it is found that the landlord had a hand in the ouster, a suit by the tenant to recover possession of the holding is governed by Art. 3 of Sch. III to the Bengal Tenancy Act, and if it is found that the ouster took place more than two years before suit, the suit must be dismissed as barred by time. [p. 341, col. 1.]

Where the question of limitation is raised in the written statement of the defendant and an issue is framed thereon, even if the issue is not pressed in the Trial Court, it is open to the defendant to press the point in appeal and if it is shown that the suit is barred by time it is the duty of the Appellate Court to dismiss the suit. [*ibid.*]

Appeal from a decision of the Subordinate Judge, Muzafferpore, dated the 26th April 1922, against that of the Munsif, Muzafferpore, dated the 11th of February 1921.

Messrs. *S. M. Mullick* and *S. N. Ray*, for the Appellants.

Messrs. *K. P. Jayaswal* and *Murari Pd*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiffs against a decision of the Subordinate Judge of Muzaffarpur, dismissing their suit for possession of 7 *bighas* and odd land. The plaintiffs contended that they had acquired right of occupancy in the land and that they were dispossessed by the defendants in 1326 which corresponds to some time in May or June 1919. Their case was that the land in dispute was formerly the holding of certain tenants, and in execution of rent decrees against these tenants, the landlords who are the defendants second party in these suits sold the holding and purchased the same in execution and took possession thereof. On the 4th of June 1910, the plaintiffs took settlement of the land in dispute from the second party under a *kabuliyat* in which they described the land as *zerait* land of the proprietor and the term of the settlement was from *Jeth* 1317 to *Baisakh* 1324. They alleged that they were settled *raiyats* of the village and, although the settlement was for a term of years, yet under the law they acquired a right of occupancy in the land and that they were entitled to retain possession. Their case was that they were dispossessed in May or June 1919, by the landlords, who gave a settlement of the land to the defendants first party in the year 1326. They accordingly brought the present suit for possession. Two sets of written statements were filed. One by the landlords and the other by the defendants first party, who are the new settlement-holders from the landlords. The landlords in their written statement stated that the plaintiffs were not settled *raiyats* of the village and did not acquire any right of occupancy in the land. They further alleged that the disputed land was settled with the plaintiffs as *zerait* for a period upto 1324 *F. S.*, and that the plaintiffs in accordance with the agreement contained in the *kabuliyat*, gave up possession at the end of 1324 and the landlords took possession thereof in 1325 and settled the lands with the defendants first party. They pleaded limitation and want of title in the plaintiffs. The defendants first party alleged that the plaintiffs gave up the land in suit just on the expiry of the term of the *kabuliyat* and the defendants took Settlement thereof on the *batai* system from the *amlas* of the landlords and then, in the next year 1326, they took *nakdi* settlement under the *kabuliyats*.

The learned Munsif framed a large number of issues in the suit. Issue No. 2 was as to whether the plaintiffs' suit was barred by the Law of Limitation. Issue No. 5 was whether the plaintiffs surrendered the disputed land to the defendants second party after the termination of the term of the *kabuliyat*; and Issue No. 3 was as to whether the plaintiffs were the settled *raiyats* of the villages and whether they

have got any right in the disputed land. On the question of surrender the Munsif came to a finding that the plaintiffs did not surrender the land after the expiry of the term of the *kabuliyat*, but held over and were dispossessed by the defendants after the decision of a case under s. 145 of the Cr. P. C., which was in May 1919. On the question of status of the plaintiffs the learned Munsif came to the conclusion that the plaintiffs were settled *raiyats* of the village and as such they acquired a right of occupancy in the land in suit. On the question of limitation the learned Munsif stated that the Pleaders had not addressed any argument on this question. He accordingly decreed the suit.

On appeal the learned Subordinate Judge has dismissed the suit on the ground of limitation.

Against this decision the present second appeal has been filed on beahlf of the plaintiffs and the point taken by the learned Vakil for the appellants is that upon the findings arrived at, the Court below was wrong in holding that the suit was barred by limitation. It has also faintly been argued that the question of limitation not being pressed in the Trial Court the learned Subordinate Judge ought not to have allowed the defendants to raise the question on appeal. As regards the last point it is clear that the question was raised in the written statement and an issue was framed; and even if it was not pressed in the Trial Court, it was open to the defendants to press that point on appeal. Section 3 of the Limitation Act and s. 184 of the Bengal Tenancy Act are clear upon the point.

On the merits the findings of the learned Subordinate Judge are that there was an ouster of the plaintiffs, that the landlords had a hand in the ouster of the plaintiffs and that the ouster took place more than two years before the suit. Upon those findings the suit was clearly barred by the provisions of Art. 3, Sch. III of the Bengal Tenancy Act. It has, however, been contended by the learned Vakil for the appellants that the learned Subordinate Judge has come to a finding upon a case different from that made by the defendants in their written statement. He refers to the written statement of the defendants second party, who are the landlords, where they state that the plaintiffs were in possession up to the end of 1324 and that land passed into the possession of the landlords afterwards. He points out that the last date of the *Fasli* year 1324 corresponds to the 1st of September 1917, and the present suit was brought on the 1st of September 1919 and, therefore, within two years from the date of the ouster; and, therefore, the suit was not barred by limitation. Now, although the defendants second party state that the plaintiffs remained in possession up to the end of 1324, the evidence given in the case was that the plaintiffs remained in possession up to *Baisakh* 1324, that is, when the term of the lease expired. The defendants first party in their written statement have expressly stated that the plaintiffs gave up possession immediately after the expiry of the term of the *kabuliyat* and that the defendants first party took settlement of the land thereafter. There was evidence in the case at least of three witnesses, namely, the defendants' witnesses Nos. 2, 5 and 6, as would appear on a reference to the decision of the Trial Court, who stated that the Settlement with the defendants first party was made in *Jeth* 1324. There was, therefore, evidence in the case upon which the Subordinate Judge could come to a finding that the plaintiffs ceased to be in possession from *Jeth* 1324 and the finding of the learned Subordinate Judge, on a consideration of the entire evidence in the case, that the dispossession took place in *Jeth* 1324, which will be more than two years from the date of the suit, is a finding which would justify the decree made by him.

It is next contended by the learned Vakil for the appellants that when there was no issue raised as to the special limitation under Art. 3, Sch. III of the Bengal Tenancy Act, and, as there was no such issue raised, the learned Subordinate Judge ought not to have dismissed the suit on a plea of special limitation. The issue as framed did not specify as to whether the plea of limitation was under the Limitation Act or under the Bengal Tenancy Act; but, on the face of the pleadings of the parties, it is clear that what was intended was plea of special limitation under the Bengal Tenancy Act.

Under these circumstances and having regard to the findings of the Subordinate Judge, I am of opinion that there are no merits in this second appeal and it must be dismissed with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION NO. 2 OF 1923.

February 20, 1925

Present:—Mr. Kennedy, J C., and Mr. Rupchand Billaram, A. J. C.

KHUSHIRAM TEJBHANDAS—APPLICANTS

versus

JHALIBAI AND OTHERS—OPPONENTS.

Guardians and Wards Act (VIII of 1890), s. 35—Civil Procedure Code (Act V of 1908), ss. 141, 145—Money misapplied by guardian—Failure of surety to pay—Surety bond, enforcement of—Procedure.

A surety under the Guardians and Wards Act who has failed to comply with an order of the Court directing him to refund sums misapplied by the guardian cannot be proceeded against under the procedure laid down in s. 145, read with s. 141, of the C. P. C. A regular suit must be instituted against him as provided in s. 35 of the Guardians and Wards Act. [p. 342, cols. 1 & 2.]

Per Rupchand, A. J. C.—The ordinary mode of enforcing an obligation under a surety bond is by a suit. Section 145, C P. C., however, provides for a special or summary mode of enforcing a surety bond executed by a surety in a pending suit. It confers jurisdiction on the Court to make the surety a party to the suit, and to enable the party for whose benefit the bond was executed to enforce it by the ordinary process of execution of a decree in substitution of the ordinary remedy by a suit. This section deals with something more than a mere mode of trial in a pending proceeding, and confers a substantive right of making a person who is not a party to a pending suit, to be made a party to it, and to be amenable to the jurisdiction of the Court in execution proceedings It cannot be extended to apply to enforcement of surety bonds given in favour of the Court in proceedings other than suits. [p. 343, col. 1.]

Revision against an order of the District Judge, Sukkur, dated the 7th October 1922.

Mr. *Srikishandas H. Lulla*, for the Applicants.

Messrs. *Tolasing Khushalsing* and *Dipchand Chandumal*, for Opponents Nos. 2 and 3.

JUDGMENT.

Kennedy, J. C.—In this case Naraindas was appointed by the District Court, Sukkur, guardian of the property of a certain minor. The applicants entered into a bond that the guardian would duly perform his duties. The District Court was of the opinion that the guardian had failed properly to act and had misapplied a large part of the minor's estate. The District Court, therefore, directed a warrant to issue for the attachment of the property of the sureties inasmuch as the surety had failed to comply with an order directing him to refund the amount misapplied. The sureties come here seeking to have the order set aside on revision.

It may be taken for present purpose that the bond requires that the surety should make good defalcation by the guardian. The bond is not very explicit and the form obviously needs revision.

The question at present is whether the procedure laid down in s. 145 of the C. P. C. is applicable to the case of a surety under the Guardians and Wards Act or whether the only redress is by way of a suit under s. 35 of the Guardians and Wards Act. The matter is not free from difficulty but it seems on the whole that the sureties in such a case do not give a bond for the fulfilment of any condition "imposed on the principal *in any suit or in any proceeding consequent thereon*." It is said that s. 141 of the C. P. C. extends the meaning of "suit" so as to cover an order in guardianship. That is true and it might be that if the guardian had agreed in such a proceeding on the application of a party to pay a defined sum into Court on a particular date and the applicant had guaranteed that he would do so and he now failed, s 145 would have applied but that is not the case here. If that be so then the procedure laid down by s. 145 of the C. P. C. is inapplicable.

What seems to fortify this conclusion is the fact that it would not appear possible to proceed against the guardian himself in that summary way but under the Guardians and Wards Act the guardian can only be coerced by fine and imprisonment. It could not have been intended that there should be a more rigorous proceeding against the surety than against the guardian.

I am, therefore, of the opinion that the order of the District Judge ordering attachment of the property of the applicants is *ultra vires*. I would set it aside without any order of costs and without prejudice to anything which may be urged on either side should the bond be assigned, and sued on, which seems to be the only correct remedy.

Rupchand, A. J. C.—I concur with the learned Judicial Commissioner in the proposed order.

Section 141, C. P. C., provides for the rules of procedure or practice laid down in the Code in regard to suits being followed as far as applicable to civil proceedings other than suits. It presupposes

a pending proceeding properly instituted in a competent Court having jurisdiction to deal with its subject-matter and is limited in its operation to the mode of trial in such proceedings distinguished from the mode in which an alleged right or obligation may be enforced or challenged in a Court of Law.

The ordinary mode of enforcing an obligation under a surety bond is by a suit.

Section 145, C. P. C., however, provides for a special or summary mode of enforcing a surety bond executed by a surety in a pending suit. It confers jurisdiction on the Court to make the surety a party to the suit, and to enable the party for whose benefit the bond was executed to enforce it by the ordinary process of execution of a decree in substitution of the ordinary remedy by a suit. This section deals with something more than a mere mode of trial in a pending proceeding, and confers a substantive right of making a person who is not a party to a pending suit, to be made a party to it, and to be amenable to the jurisdiction of the Court in execution proceedings. It cannot, in my opinion, be, therefore, extended to apply to enforcement of surety bonds given in favour of the Court in proceedings other than suits. In a properly constituted suit, it is not the Court but the party for whose benefit the bond is given, who applies for enforcement of the bond in execution proceedings. He is the *dominus litis* for the purpose of the execution application. He is responsible for the conduct of the proceeding, and for its expenses, it being carried on entirely for his benefit.

A minor can hardly be said to be a party to the guardianship proceedings. It is difficult to see how the rules of procedure pertaining to execution proceedings taken at the instance of a party can be applied for the purpose of enforcing a bond executed by a surety in favour of the Court in guardianship proceedings or be applied so as to enable the Court to issue execution *suo motu*. Section 35 of the Guardians and Wards Act provides for the bond being assigned by the Court in favour of a person interested in the minor's welfare to enable him to enforce it by a regular suit, and it would appear that in the state of the law as at present, this would be the only mode of enforcing the surety bond. Even as against the guardian himself who is the principal party under the bond it would appear that the remedy of enforcing it by attachment and sale of the property of the guardian is not by proceeding under the Guardians and Wards Act but by a suit filed by the assignee, though s. 45 of the Guardians and Wards Act empowers the Court to detain the guardian in prison and impose a daily fine on him until he complies with the orders of the Court.

It is no doubt desirable that the Court should have summary jurisdiction to enforce surety bonds executed in its favour in guardianship proceedings, but it is for the Legislature to confer such jurisdiction, and cannot be assumed by virtue of s. 141, C. P. C.

Z. K. *Order set aside.*

PATNA HIGH COURT.

CIVIL REVISION No. 45 OF 1925.

May 21, 1925.

Present:—Mr. Justice Adami and Mr. Justice Kulwant Sahay.

Babu RAM CHANDER TEWARY —PETITIONER

versus

GUDAR POTEDAR AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 75—Mortgage suit—Defence that mortgage-debt had been satisfied out of usufruct—Commission, issue of—Commissioner, authority of, scope of.

The defence to a mortgage suit was that the mortgagee had been in possession of a portion of the mortgaged property and that the mortgage-debt had been satisfied out of the usufruct of the property. At the request of the defendant a Commissioner was appointed but it was not clear for what purpose the commission was issued:

Held, that the Trial Court could not delegate all its judicial powers to the Commissioner and that the utmost that the Commissioner could do was to investigate and report on the amount of profits derived from the mortgaged land during the years in suit, but that he would have no power to take evidence as to the plaintiff's possession or the extent of that possession. [p. 344, col. 1.]

Appeal from an order of the Subordinate Judge, Purnea, dated the 16th January 1925.

Mr. *Janak Kishore*, for the Petitioner.

Messrs. *B. N. Mitter* and *K. L. Moitra*, for the Opposite Party.

JUDGMENT.

Adami, J.—The petitioner instituted a suit against the opposite party on the

basis of a mortgage-bond dated the 21st August 1917. The reply of the defence to the plaint was that the petitioner had been in possession of a portion of the mortgaged property and had satisfied the mortgage debt out of the usufruct of the property. The opposite party defendants asked that a Commissioner should be appointed. It is not clear for what purpose the Commissioner was to be appointed, for the writ of commission is not on the record.

The learned Subordinate Judge ordered a commission to issue and appointed a Commissioner. Thereafter the present petitioner objected to the issue of the commission before the Subordinate Judge who succeeded the Subordinate Judge who had directed the commission to issue. The Subordinate Judge rejected the petition of the petitioner and held that the Commissioner should proceed to carry out the commission.

Before us it is objected that the questions to be decided were whether the bond was a usufructuary mortgage-bond and whether the petitioner had in fact been in possession of the property, and it would seem that the work the Commissioner was to do was to inquire as to the possession of the petitioner. As I have said before, we have not the writ before us and we do not know what instructions were issued to the Commissioner but Mr. Janak Kishore agrees that if the Commissioner merely inquires into the amount of the profits from the mortgaged lands there will be no objection to the Commissioner proceeding, otherwise the Commissioner would not be empowered to take evidence as to the plaintiff's possession or the extent of that possession.

It is clear that the lower Court could not delegate all its judicial powers to the Commissioner and that the most that the Commissioner could do would be to investigate and report on the profits arising from the mortgaged lands during the years in suit.

With a direction, therefore, that the Commissioner's inquiry should be confined to this investigation as to the profits from the lands, the order of the lower Court will be upheld and the Commissioner will be directed to continue his investigation in the direction which I have stated.

There will be no order for costs.

Kulwant Sahay, J.—I agree.

Z. K. *Petition rejected.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1684 OF 1923.

May 19, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

ROSHAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MAHARAJ PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law — Partition—Presumption—Subsequent suit for partition of particular property which is alleged to be joint—Burden of poof.

Where there has been a partition of Hindu joint family property the presumption is that the partition was complete. If in a subsequent suit for partition it is alleged that the property which is the subject of the suit was not partitioned at the time when the rest of the properties were partitioned and that it has continued joint, the burden is on the plaintiff to prove that the property is ancestral and is liable to partition. [p. 345, col. 1.]

Kundal Lal v. *Shankar Lal*, 21 Ind. Cas. 13; 35 A. 564; 11 A. L. J. 910, distinguished.

Second appeal from a decree of the Additional District Judge, Bareilly, dated the 31st August 1923.

Mr. *S. C. Das*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—In this case one Shib Dayal brought a suit for recovery of a moiety of certain properties by partition against his uncle Raghubar Dayal's sons Maharaj Prasad and Matru Lal. On Shib Dayal's death were substituted his sons Roshan Lal and Mukat Behari Lal. The properties were six in number. For the purposes of this appeal it is not necessary to specify them other than by their numbers 1 to 6. It is admitted that about the year 1893 there was a partition of the *zemindari* property. The question at issue in this case was whether these other six properties were ancestral and, therefore, the plaintiff was entitled to a moiety thereof or whether they were, in fact, the self-acquired properties of the defendants or their father Raghubar Dayal. After the case had been remanded by the lower Appellate Court for a decision as to whether the properties were ancestral or not, the lower Appellate Court gave the plaintiff a decree as regards the properties Nos. 3 and 6 holding them to be ancestral and dismissed his suit as regards Nos. 1, 2, 4 and 5 on a two-fold ground that the plaintiff had failed to prove that those four properties were ancestral and that the defendants had been in possession over them within 12 years of the institution of the suit. The latter part of this finding we

consider to be surplusage. In our opinion, it would have sufficed for the lower Appellate Court to have held that the plaintiff had failed to prove that they were ancestral properties. Certain objections have been taken before us here as regards the statement of Matru Lal, son of Raghubar Dayal, and a further statement made in Ex. 2. No objection has been taken in regard to these matters in the grounds of appeal but altogether apart from that we consider that their import and effect was purely a question of evidence and the lower Appellate Court was entitled to give them such weight as it thought fit.

The real question that has seriously been argued before us is that the burden of proof was wrongly thrown upon the plaintiff. The lower Appellate Court said "the plaintiff has failed to prove by any satisfactory evidence that the property in suit is the joint ancestral property of the parties." We think that the lower Appellate Court was right in laying the burden on the plaintiff. It is clear that the allegation that the property was ancestral was the only title upon which he came to Court and it was obviously for him to prove it. For the contrary proposition we are referred to by the appellants' Counsel to the case of *Kundan Lal* v. *Shankar Lal* (1). The case there is clearly distinguishable. It dealt with a case in which there had been no partition at all between the parties and the simple question whether the family being completely joint in every way and never having gone through a partition of any sort, the presumption was that any property held by an individual member of the family belonged to the joint family or not. We have here a totally different proposition. There had admittedly been a partition and the plaintiff was claiming that certain other properties were ancestral properties and that they had not been partitioned. The initial presumption certainly is that where there has been a partition it is complete and it is certainly clear here that it was for the plaintiff to prove his title. He failed to do that and we think that his suit was rightly dismissed as regards the four properties in regard to which he failed.

The result is that this appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 21 Ind. Cas. 13; 35 A. 561; 11 A. L. J. 910.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 15-B OF 1924.

January 20, 1925.

Present :—Mr. Baker, J. C., and Mr. Prideaux, A. J. C.

GANPATI—DEFENDANT - APPELLANT

versus

Musammat SALU—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Widow succeeding to son who has left widow, whether can adopt—Lex loci *in Berar—Mitakshara and Mayukha, priority between—Inheritance—Father's sister* versus *father's sister's son.*

Where a Hindu dies leaving a widow and a son and that son subsequently dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow to make an adoption is extinguished and can never afterwards be revived. Where, therefore, on the re-marriage of the son's widow the father's widow succeeds to the estate of her son, she has no power to make an adoption. [p. 346, col. 1.]

In Berar the Mitakshara is paramount and the Mayukha is of secondary consideration, being only relied upon where the Mitakshara is silent or doubtful. [p 347, col 1.]

The Mitakshara is silent as to the priority between a father's sister and a father's sister's son, but under the Mayukha the former is to be preferred to the latter. Therefore, in Berar a father's sister is a preferential heir over the father's sister's son. [p 346, col. 2.]

Case-law discussed.

Appeal against a decree of the Subordinate Judge, Buldana, dated the 17th December 1923, in Civil Suit No. 160 of 1922.

Mr. *M. B. Niyogi*, for the Appellant.

Sir *B. K. Bose* and Messrs. *V. Bose*, *A. V. Khare* and *W. B. Pendharkar*, for the Respondent.

JUDGMENT.—This appeal raises two points of Hindu Law.

It arises out of a suit by the respondent *Musammat* Salu, claiming to be the next reversioner, for a declaration that *Musammat* Kasai had no authority to adopt the minor Ganpati.

The genealogy is given in the judgment. The essential points in it are that Fakirji had three daughters including the plaintiff Salu and a son Kadtu. Kasai, who died during the pendency of the appeal, was widow of Kadtu. Kadtu's son Laxman predeceased Kasai his mother. He died in 1913 and his widow Anandi re-married in 1914. Kasai then succeeded to his property. She adopted Ganpati, and the plaintiff Salu, who is paternal aunt of Laxman, being the sister of his father Kadtu, brought this suit for a declaration that Kasai had

no right to adopt. The First Court decided in her favour and the adopted son through his next friend appeals against the decree on the ground that Salu is not the next reversioner, as her sister's sons are to be preferred to her and that the adoption is valid.

With regard to the validity of the adoption there is little to be said. The learned Pleader for the appellant admits that there is no reported case similar to the present, where the mother did not succeed directly to her son, but succeeded after the marriage of his widow. He refers to the following cases :—

Gavdappa v. *Girimallappa* (1), *Venkappa Bapu* v. *Jivaji Krishna* (2), and *Anjirabai Gulabrao* v. *Pandurang Balkrishna* (3).

These are all cases where the widow succeeded directly to her son, who left no widow or issue, and do not apply. The remaining cases quoted have no application. The law applicable is laid down in *Ramkrishna* v. *Shamrao* (4), *viz.*, that where a Hindu dies, leaving a widow and son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived. This was followed in *Datto Govind* v. *Pandurang Vinayak* (5) and in *Yeknath Narayan* v. *Laxmibai* (6) and was approved by the Privy Council in *Madana Mohana Ananga Bheema Deo* v. *Purushothama Ananga Bheema Deo* (7).

It is clear, therefore, that Laxman having left a widow who could have adopted, Kasai the mother had no power to do so on her succession to the estate on the re-marriage of her son's widow.

The other question presents more difficulty.

Plaintiff is the paternal aunt (father's sister) of Laxman. She has sisters who have sons and it is contended that the sisters' sons are the nearer reversioners in preference to her. It is argued that the paternal aunt is not specifically mentioned in the Mayukha. In *Saguna* v. *Sadashiv Pandu* (8) she was held to be a *bandhu*. This was followed in *Madho* v. *Janki* (9).

It is contended that she is excluded by her sisters' sons on the ground that a male *bandhu* is entitled to succeed in preference to a female even though the latter is nearer in degree. This was held in *Balkrishna Bhimaji* v. *Ramkrishna Gangadhar* (10), and *Girimallappa Channappa* v. *Kenchava San-Yellappa* (11). This latter case was upheld on appeal by the Privy Council in *Kenchava* v *Girimalappa* (12): At page 785* their Lordships say : "The principle that among *bandhus* the male is entitled to preference over the female—even though the latter is nearer in degree—was accepted as being law for the Bombay Presidency as much as for the Madras Presidency; and preference was given to a mother's sister's son over a brother's daughter." At page 786* they say that there is no case in the Bombay Presidency which decides that some preference is not to be given to male *bandhus* over female, and there is no doubt that throughout the rest of India preference for the male would be certain.

It would, therefore, appear that if the father's sister is a *bandhu*, her sister's sons, who are also *bandhus*, would be given preference over her on account of their sex.

It is, however, contended on behalf of the respondent that the father's sister is a *gotraja sapinda* and so excludes *bandhus*. This is based on *Vijiarangam* v. *Lakshuman* (13) and it is contended that this has never been challenged. The learned Counsel for the respondent also refers to *Dattatraya Bhimrao* v. *Gangabai* (14).

It is contended that in *Balkrishna Bhimaji* v. *Ramkrishna Gangadhar* (10) the dispute was between a female *bandhu* claiming through the male line and a male *bandhu* claiming through the female line, while in *Kenchava* v. *Girimalappa* (12) both were of the same degree.

(1) 19 B. 331; 10 Ind. Dec. (N. S.) 224.
(2) 25 B. 306; 2 Bom. L. R 1101.
(3) 80 Ind. Cas. 185; 48 B. 492; 26 Bom. L. R. 326; (1924) A. I. R. (B.) 441.
(4) 26 B. 526; 4 Bom. L. R. 315.
(5) 32 B. 499; 10 Bom. L. R. 692.
(6) 77 Ind. Cas. 117; 47 B. 37; 24 Bom. L. R. 836; (1922) A. I. R. (B.) 347.
(7) 46 Ind. Cas. 481; 41 M. 855 at p. 859; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 20 Bom. L. R. 1041; 23 C. W. N. 177; 45 I. A. 156 (P. C.).
(8) 26 B. 710; 4 Bom. L. R. 527.
(9) 36 Ind. Cas 514; 12 N L. R. 148.
(10) 59 Ind. Cas. 771; 45 B. 353; 22 Bom. L. R. 1442.
(11) 61 Ind. Cas. 294; 45 B. 788; 23 Bom. L. R. 213.
(12) 82 Ind. Cas. 966; 26 Bom L. R. 779; (1924) A. I. R. (P C.) 209; 20 L. W. 417; 47 M. L. J 401; (1924) M. W. N. 719; 48 B. 569; 22 A. L. J. 962; 40 C. L. J. 447; 35 M. L. T. 241; 51 I. A. 368; 29 C. W. N. 271 (P. C.).
(13) 8 B. H C. R. O. C. J. 244 at p. 261.
(14) 77 Ind. Cas. 17; 46 B. 511 at p. 551; 24 Bom. L. R. 69; (1922) A. I. R. (B.) 321.

*Pages of 26 Bom. L. R.- [*Ed.*]

It is to be observed that the cases above quoted all refer to *bandhus*. In *Saguna* v. *Sadashiv Pandu* (8) *supra*, Jenkins, C. J., did not dissent from the view of Mr Justice West in *Vijiarangam* v. *Lakshuman* (13) that the paternal aunt is a *gotraja-sapinda*. He held that it was unnecessary to consider whether under the Mitakshara, as interpreted in Bombay, the paternal aunt is to be considered as a *sagotra* or as a *bhinnagotra-sapinda;* it is enough to say that she is not more remote than a *bandhu*. We have not been referred to any decision of the Bombay High Court in which Mr. Justice West's view has been overruled. That view is based on the Mayukha.

In Mulla's Hindh Law, 4th Edition, page 74, it is stated that while according to Mayukha the father's sister is a *gotraja-sapinda*, it is not settled whether under the Mitakshara, as interpreted in the Bombay Presidency, she is *gotraja-sapinda* or a *bandhu*.

It was very recently held by a Full Bench, of which we were both members, in *Narain* v. *Tulsiram* (15), that in Berar, following the Bombay Deccan, the Mitakshara is paramount and the Mayukha is of secondary consideration, being only relied upon where the Mitakshara is silent or doubtful.

Admittedly the Mitakshara is silent on the point with which we are now concerned.

In these circumstances we do not think there are sufficient grounds for differing from the view of the lower Court and the appeal will be dismissed with costs.

Appeal dismissed.

Z. K.

(15) 87 Ind. Cas. 979.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 255 OF 1923.

November 26, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

PANCHKARI MAJUMDAR—JUDGMENT-DEBTOR—APPELLANT

versus

GIRIDHARIMAL MOHESRI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 13, 44—Foreign decree, execution of—Executing Court, whether can refuse to execute decree on ground of want of jurisdiction.

The provisions of s. 13 of the C. P. C. are applicable to decrees that are transferred to British Courts for execution under the provisions of s. 44 of the Code and it is open to an Executing Court to whom a decree has been sent for execution under the provisions of s. 44 to refuse execution on the ground that the Court that passed the decree had no jurisdiction to pass it. [p. 348, col. 1.]

Appeal against an order of the Officiating Subordinate Judge, Jalpaiguri, dated the 23rd February 1923, affirming that of the Munsif, First Court, Jalpaiguri, dated the 28th June 1922.

Babu *Hemendra Nath Bose*, for the Appellant.

Babu *Atul Chandra Gupta*, for the Respondent.

JUDGMENT.—This appeal raises a question of some importance which in so far as this Court is concerned is one of first impression.

The opposite party the respondent in this appeal obtained a decree against the appellant in the Mekliganj Court which is within the Native State of Cooch Behar. The decree was obtained *ex parte*. The judgment-debtor, the appellant, is a British subject residing at Jalpaiguri. The respondent had the decree transferred to Jalpaiguri for execution. The judgment-debtor the present appellant objected to the execution of the decree under s. 13 of the C. P. C. on the ground that the decree had been obtained by fraud and also that the Cooch Behar Court had no jurisdiction over him. The First Court decided the case in favour of the respondent for reasons that it is not necessary to recapitulate. The appellant appealed to the District Court That Court held relying on the authority of a case of *Veeraraghava Aiyar* v. *Muga Seit* (1) that the Executing Court could not go into the question of the jurisdiction of the Court which passed the decree when the decree was one to which the provisions of s. 44 applied. On this finding he dismissed the appeal.

The judgment-debtor has appealed to this Court. He contends that the case relied on by the respondent which was a decision of a Single Judge of the Madras High Court has been expressly overruled by a Full Bench of that Court: *Veeraraghava Aiyar* v. *Muga Seit* (2) and is, therefore, no authority. In further support of the view that

(1) 20 Ind. Cas. 704; (1913) M. W. N. 605; 14 M. L. T. 96.

(2) 26 Ind. Cas. 287; 39 M. 24; 16 M. L. T. 479; 27 M. L. J. 535; 1 L. W. 887; (1915) M. W. N. 162.

he would ask the Court to adop he relies on the case of *Jivappa Tammappa* v. *Jeerji Murgeappa* (3).

We think that the appeal must be allowed. In the Madras Full Bench case it was held that it was open to the Executing Court to whom a decree had been sent for execution under the provisions of s. 44 to refuse execution on the ground that the Court that passed the decree had no jurisdiction to do so. Wallis, C. J., in disposing of the case remarked: "I agree generally with the judgment of Sundara Ayyar, J., that s. 44 has not the effect contended for, and that a British Court ought not to execute a decree of the Cochin Court passed without jurisdiction. That judgment is a judgment of foreign Court within the meaning of s. 13, C. P. C., and it would, in my opinion, require much plainer words than are to be found in s. 44 to show that it was the intention of the Legislature that decree of foreign Courts to which s. 44 applies should be enforced in British Courts without regard to the provisions of that section. Full effect may be given to that section by holding that it was merely intended to alter the procedure by which such foreign judgments can have effect given to in British India. This was decided more than twenty years ago by Farran, J., in *Haji Musa Haji Ahmad* v. *Purmanand Nursey* (4) which apparently has not been questioned in our Courts until the present case and was known to the Legislature when the provisions of the last Code were revised and the present Code was enacted." Seshagiri Ayyar, J., states that in his opinion s. 44 of the C. P. C. is subject to the same limitations as are contained in s. 13 regarding foreign judgments.

The same view has been taken by the Bombay High Court in the case of *Jivappa Tammappa* v. *Jeerji Murgeappa* (3), a case practically on all fours with the present case. We see no reason to differ from these two decisions and we may adopt the reasoning of the learned Judges in those decisions as our own. We are, therefore, of opinion that the provisions of s. 13 of the C P. C. apply to decrees that are transferred to British Courts for execution under the provisions of s 44. It was, therefore, open to the lower Appellate Conrt to have gone into the question whether the decree was passed without jurisdiction. In this view of the case it would have been necessary to have sent the case back to the lower Appellate Court to decide whether the decree was made without jurisdiction or was obtained by fraud. But the learned Vakil who has appeared for the respondent states that if our decision is against him on the question whether the Executing Court could go into the question of the jurisdiction of the Court to pass the decree then there is no necessity to send the case back to the lower Court for on the facts found by the lower Courts and on the authority of the decision of the Judicial Committee of the Privy Council in *Gurdyal Singh* v. *Raja of Faridkot* (5), the decree that he seeks to execute is a nullity.

The appeal, therefore, succeeds and it must be held that there is no decree that the Executing Court can execute. The application for execution must, therefore, be rejected.

The appellant is entitled to his costs in all Courts. Hearing-fee one gold *mohur*

Z. K. *Appeal allowed.*

(3) 36 Ind. Cas. 363; 40 B. 551; 18 Bom. L R.
(4) 15 B. 216; 8 Ind. Dec. (N. S.) 146.
(5) 22 C. 222; 21 I. A. 171; 4 M. L. J. 267; 6 Sar. P. C. J. 503; 112 P. R 1894; (1894) A. C. 670; 11 R. 340; 11 Ind. Dec. (N. S.) 149 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 12 OF 1924.

May 14, 1925.

Present :—Mr. Dalal, J. C., and Mr. Gokaran Nath Misra, A. J. C.

BIBI BATUL—DEFENDANT—APPELLANT

versus

DEBI PRASAD—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 16—Undue influence, what amounts to—Mortgage—Indebtedness to brother of mortgagee, effect of—Interest, high rate of, when can be reduced—Principles applicable.

Questions arising in India as to undue influence and unconscionable bargains and dealings with expectant heirs must be decided on the provisions of the Contract Act, and these alone. The principles on which the English Courts of Equity deal with similar questions are entirely inapplicable to India. [p. 349, col. 2.]

Balla Mal v. *Ahad Shah*, 48 Ind. Cas. 1; 16 A. L. J. 905; 35 M. L. J. 614; 124 P. R. 1918; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.), followed.

Apart from any question of undue influence or fraud a Court has no power to reduce the contracted rate of interest solely on the ground that it is excessive. [p. 349, cols. 1 & 2.]

Bibi Batul v. *Kedar Nath*, 88 Ind. Cas. 810; 12 O. L. J. 372; (1925) A. I. R. (O.) 462, *Chhannu Lal* v. *Musammat Raj Kuar*, 43 Ind.Cas. 295; 20 O. C. 318 and *Fazal Azim* v. *Girdhari Lal*, 69 Ind. Cas. 657; 9 O. L. J. 442, followed.

A party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will. [p. 349, col 2.]

The fact that a mortgagor was, at the time of executing the mortgage, indebted to the brother of the mortgagee does not prove that the mortgagee was in a position to dominate the will of the mortgagor. [*ibid.*]

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 12th November 1923.

Mr. *Ganpat Sahai Varma*, for the Appellant.

Mr. *M. Wasim* for Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is another suit for sale by another plaintiff Debi Prasad under the same circumstances as are mentioned in Appeal No. 11 of 1924 [*Bibi Batul* v. *Kedar Nath* (1)] decided to-day by this Bench.

We have already given our reasons in that judgment for holding that the lady defendant, *Musammat* Bibi Batul, understood the contents of the power-of-attorney executed by her in favour of her son and fully realised the effect of her action. We have also held that Zakir Husain was entitled to mortgage the lady's property for her benefit.

The only question which remains for decision here is of interest. The mortgage-deed in suit allows extortionate interest at Rs. 2-8-0 per cent. per mensem with six monthly rests, and a sum of Rs. 300 borrowed on 29th December 1908 had swollen to the enormous proportion of Rs. 10,447-1-0 at the time of the institution of the suit on 23rd December 1921. We regret that as the law stands at present we are unable to grant the defendant-appellant any relief. In *Chhannu Lal* v. *Raj Kuar* (2), a learned Judge of this Court held that more excessive rate of interest did not entitle this Court to grant relief to a person who had contracted to pay that rate. In *Fazal Azim* v. *Girdhari Lal* (3), another Judge of this Court laid down that a Court had no power to reduce the contracted rate of interest solely on the ground that it was excessive, apart from any question of undue influence or fraud. The last ruling is supported by a Privy Council decision not mentioned there. That decision is *Balla Mal* v. *Ahad Shah* (4). Their Lordships held that questions as to undue influence and unconscionable bargain and dealings with expectant heirs must be decided on the provisions of the Indian Contract Act, and these alone, and that the principles on which the English Courts of Equity deal with similar questions are entirely inapplicable. On the same principles was founded another judgment of their Lordships of the Privy Council in *Raghunath Prasad* v. *Sarju Prasad* (5).

In the grounds of appeal to this Court no question of undue influence was raised. The grounds dealing with the question of interest are Nos. 6 and 7 where it is merely alleged that the stipulated interest was hard, extortionate and unconscionable and that the plaintiff was not entitled to recover the entire amount thereof. Looking into the facts also, there is no cause to hold that undue influence was exercised by the plaintiff on Zakir Husain. It was pointed out in the ruling of the Privy Council quoted above from 51 Indian Appeals [*Raghunath Prasad* v. *Surja Prasad* (5)] that a party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will. No such position is made out here. In fact the allegation in para. 16 of the written statement was vague and Zakir Husain himself did not enter the witness-box. Undue influence was alleged in that para. but no detail thereof was given. The only fact mentioned was that Zakir Husain was at the time of the mortgage indebted to one Behari Lal brother of the mortgagee. This did not put the mortgagee in a position to dominate the will of Zakir Husain. We hold that the appellant must pay the entire interest.

Having regard, however, to the extortionate nature of the rate of interest we refuse to grant future interest and direct that

(1) 88 Ind. Cas. 810; 12 O. L. J. 372; (1925) A. I. R. (O.) 462.
(2) 43 Ind. Cas. 295; 20 O. C. 318.
(3) 69 Ind. Cas. 657; 9 O. L. J. 142.
(4) 48 Ind. Cas. 1; 16 A. L. J. 905; 35 M. L. J. 614; 124 P. R. 1918; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom L. R. 558 (P. C.)
(5) 82 Ind. Cas. 817; 51 I. A. 101; (1924) A. I. R. (P. C.) 60; 5 P. L. T. 72; 22 A L. J. 105; 2 P. L. R. 87; 19 L. W 470; 34 M. L. T. 57; 46 M. L. J. 610; 3 Pat. 279; 26 Bom. L. R. 595; 28 C. W N. 834; 11 O. L J. 122; (1924) M. W. N. 638; L. R. 5 A. (P. C.) 206; 10 O. & A. L. R. 1395; 1 O. W. N. 210 (P. C.).

parties shall bear their own costs of both the Courts. The decree of the lower Court shall be amended so far. A note shall be made that the plaintiff has undertaken to put up the villages for auction one by one and not all together. The appeal is otherwise dismissed.

Z. K. *Decree modified.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 65 OF 1924.

May 4, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

GANESH PRASAD—APPLICANT

versus

BHAGELU RAM AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 141, 151, O. IX, rr. 8, 9—Dismissal of suit for default—Application for restoration, dismissal of, for default—Application, whether can be restored—Jurisdiction—Inherent power of Court.

A Court has jurisdiction on good cause shown to restore an application for setting aside a dismissal for default or an *ex parte* decree, which application has itself been dismissed for default. Such jurisdiction can be exercised either by virtue of the provision contained in r. 9 of O. IX of the C. P. C., read with s. 141 of the Code or by virtue of the inherent powers of the Court conferred upon it by s. 151 of the Code. [p. 351, cols. 1 & 2.]

Kallu v. *Nadir Baksh*, 64 Ind. Cas. 527; 19 A. L. J. 907; (1922) A. I. R. (A.) 441, *Pitambar Lal* v. *Dodee Singh*, 78 Ind. Cas. 358; 22 A. L. J. 191; 46 A. 319; (1924) A. I. R. (A.) 503; L. R. 5 A. 226 Civ., *Jamna* v. *Ramraji*, 74 Ind. Cas. 380; 9 O. L. J. 627; 9 O. & A. L. R. (O) 32; (1923) A. I. R. (O.) 146, *Bepin Behari Saha* v. *Abdul Barik*, 35 Ind. Cas. 613; 44 C. 950; 24 C. L. J. 446; 21 C. W. N. 30 and *Abdul Rahman Shah* v. *Shahana*, 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188, referred to.

Civil revision from an order of the Munsif, Azamgarh, dated the 12th of January 1924.

Mr. *P. L. Banerji*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Parties.

JUDGMENT.

Daniels, J.—This is an application in revision against an order restoring an application for restoration dismissed for default. I need express no opinion as to whether a revision lies, because we consider that in any case the application fails on the merits, but I may note that in *Kallu* v. *Nadir Baksh* (1), a Bench of this Court held that no revision lay against an order restoring the case, because the order was not a final order.

The suit had been dismissed for default. The plaintiffs applied to have it restored. That application was also dismissed for default. They then presented an application to the effect that they had been prevented from attending on the date fixed, and asked for their restoration application to be restored. It was restored on payment of Rs. 5 costs to the opposite party. The defendant in revision contends that if such an application has been dismissed *ex parte* more than thirty days after the date of the decree, the plaintiffs are left without a remedy. He relies on the decision in *Pitambar Lal* v. *Dodee Singh* (2). I notice that in the case relied on though the learned Judges held that O. IX, r. 9, did not apply they nevertheless refused to interfere. In Oudh I have followed the view, which is also taken by the Calcutta and Punjab High Courts, that O IX read with s. 141, C. P. C. can be applied to these proceedings. I may refer to the following authorities:—

Jamna v. *Ramraji* (3), *Bepin Behari Saha* v. *Abdul Barik* (4) and *Abdul Rahman Shah* v. *Shahana* (5).

There may be special reasons why O. IX should be held inapplicable to execution proceedings, but I can see none for not applying to a proceeding of this kind. The question of appeal is not to my mind an objection. If O. IX does not apply, then, as *Pitambar Lal* v. *Dodee Singh* (2) and the judgment which it follows show, the Courts have great difficulty in devising a suitable remedy. Section 151 provides an emergency power which it ought not to be necessary to resort to in a class of cases which are of every day occurrence as these are. But even if O. IX, r. 9 does not apply, I am not prepared to hold that, if a party prosecuting a restoration application is genuinely prevented from appearing, he is left without resource. To hold this might be to work great injustice. A man might, for instance, accidentally break his leg on the way to Court. If the view contended for by the applicant is correct, this acci-

(1) 64 Ind. Cas. 527; 19 A. L. J. 907; (1922) A. I. R. (A.) 441.

(2) 78 Ind. Cas. 358; 22 A. L. J. 191; 46 A. 319; (1924) A. I. R. (A.) 503; L. R. 5 A. 226 Civ.

(3) 74 Ind. Cas. 380; 9 O. L. J. 627; 9 O. & A. L. R. (O.) 32; (1923) A. I. R. (O.) 146.

(4) 35 Ind. Cas. 613; 44 C. 950; 24 C. L. J. 446; 21 C. W. N. 30.

(5) 58 Ind. Cas. 748; 1 L. 339; 82 P. W. R. 1920; 1 L. L. J. 188.

dent would lead to his suit remaining irrevocably dismissed. The attention of the learned Judges who decided *Pitambar Lal* v. *Dodee Singh* (2) was not directed to s. 151, C. P. C. If there is no other remedy we think that, that section will apply in a case such as this.

We accordingly refuse to interfere and reject this application with costs including fees on the higher scale.

Sulaiman, J.—I concur in the proposed order. I would only like to add a few words with regard to the cases which have been cited before us. In the case of *Bipin Behari Saha* v. *Abdul Barik* (4), the learned Judges of the Calcutta High Court considered that a second application for restoration of a case dismissed for default could be treated as an original application for setting aside the dismissal. If the decision merely meant that such an application for setting aside a dismissal can be filed regardless of the fact that a previous application has been dismissed, then all that I would say is that that point does not arise before us. If, however, it was intended to be laid down that an application for the restoration of an application for setting aside the dismissal does for all purposes come under O. IX, then it would be difficult to accept that view, for that may give the person whose application is dismissed a right of appeal under O. XLIII, which is not expressly provided. In the case of *Chandra Sahai* v. *Durga Prasad* (6) I have held that no such appeal lies. The Patna High Court in the case of *Ramgulam Singh* v. *Sheo Deonarain Singh* (7) held that an application for restoration of an application under O. IX for setting aside an *ex parte* decree, which had been dismissed, for default, did not lie under that Order. That view is correct. But when the learned Judges go on to say that the only remedy open to the aggrieved party was to appeal against the original order made under O. IX, it is difficult to accept that view, for it seems to me that there would be a remedy by applying to the Court to invoke its inherent jurisdiction to set aside the dismissal of that application. Section 151, C. P. C., was not considered by those learned Judges. I fail to see why a Court cannot on good cause shown restore an application for setting aside a dismissal for default or an *ex parte* decree, which application itself has been dismissed for default. In the case of *Pitambar Lal* v. *Dodee Singh* (2), it was conceded that O IX, r. 9 was not applicable to such an application but that application was treated as being itself an original application for setting aside the *ex parte* decree. This last point does not arise in this case. I would not say that an application for restoration of a previous application dismissed for default falls directly under O. IX, because of the provisions of s. 141 but I would say that such an application is entertainable under the inherent jurisdiction which the Court possesses under s. 151, C. P. C. It is easy to conceive of great hardship if this view is not to be accepted, for the dismissal of the application may take place long after the period fixed for getting the dismissal of the suit set aside has expired. In which case no useful purpose would be served by treating a fresh application as being itself an original application under O. IX. I am accordingly unable to hold that the Court below had no jurisdiction in restoring the application or that there has been any material irregularity in the exercise of its jurisdiction.

Z. K. *Application rejected.*

(6) 79 Ind. Cas. 323; 22 A. L. J. 427; 46 A. 538; (1924) A. I. R. (A.) 682; L. R. 5 A. 331 Civ.

(7) 51 Ind. Cas. 152; 4 P. L. J. 287.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 952 OF 1920.

January 9, 1924.

Present :—Mr. Justice Martineau.

Musammat MEHTAB BIBI—PLAINTIFF—APPELLANT

versus

DIN MOHAMMAD—DEFENDANT—RESPONDENT.

Custom—Succession—Daughter succeeding as heir—Property, whether reverts on failure of male issue— Arains *of Lahore—Half sister, whether preferred to mother's father's brother.*

The principle that when the succession of a daughter is allowed under the Customary Law of the Punjab she acts merely as a conduit to pass on the property to her sons and their descendants, and that when her male issue fail the land reverts to her father's agnates, applies only to a case in which a daughter has succeeded for some special reason and is not applicable to a case among tribes like *Arains* where the daughter's right of inheritance is recognized as being superior to that of collaterals. [p. 352, cols. 1 & 2.]

Among the *Arains* of Lahore a half sister is entitled to succeed in preference to the mother's father's brother even with regard to property which had come to the last male owner through his mother. [p. 352, col. 2.]

Second appeal from the decree of the Additional District Judge, Lahore, dated the 2nd March 1920.

Mr *M. Obedulla*, for the Appellant.

Lala *Shaukat Rai*, for the Respondent.

JUDGMENT.—The dispute in this case is to the right of succession to the estate left by Muhammad Din an *Arain* of *Mauza* Nawankote in the Lahore District. His land was mutated in favour of Amir, his mother's father's brother Amir has died and the present defendant is his son. The plaintiff, who lays claim to the estate, is the deceased Muhammad Din's half sister, their father having had two wives, one of whom Talia Bibi was the mother of Muhammad Din and the other the mother of the plaintiff. The First Court found for the plaintiff, but the District Judge on appeal has dismissed the suit. The plaintiff has obtained a certificate from the District Judge on the question of custom and has filed a second appeal.

I heard the appeal *ex parte* and decided it in favour of the appellant, but on the respondent's application set aside the *ex parte* decree and have heard the arguments of Counsel on his behalf. That a sister has a right of succession by the custom of *Arains* of the Lahore District is established by the entry in the *rewaj i-am*, which is supported by several instances and also by several judicial decisions which are mentioned in the First Court's judgment. It was in fact not disputed in the lower Appellate Court that the plaintiff would have been entitled to succeed to the estate if she had been Muhammad Din's full sister. The learned District Judge has held that the plaintiff is not entitled to succeed because the land has not descended from an ancestor common to the plaintiff and Muhammad Din, that is to say, did not descend to Muhammad Din, from his father, but was inherited by him from his mother who was only a step-mother of the plaintiff. It appears to me, however, that the fact that the land descended to Muhammad Din from his mother and not from his father is immaterial. Counsel for the respondents has referred to page 61 of Roe and Rattigan's Tribal Law in the Punjab and to *Lehna* v. *Thakri* (1) and other rulings, in which the principle has been laid down that when the succession of a daughter is allowed she acts merely as a conduit to pass on the property to her sons and their descendants, and that when her male issue fail the land will revert to her father's agnates. But in the first place the very fact that it was conceded in the lower Appellate Court that the plaintiff would have been entitled to succeed if she had been Muhammad Din's full sister shows that the general principle mentioned above is not fully applicable in the present case. In the second place it appears to me that that principle, while it may apply to a case in which a daughter has succeeded for some special reason, such as on account of her husband being a *khana damad*, is not applicable to a case among tribes like *Arains* where the daughter's right of inheritance is recognized as being superior to that of collaterals. There is no question that Talia Bibi was the rightful heir of her father, for a suit brought against her by Amir for possession of the property after her father's death, was dismissed. The learned District Judge admits that Talia Bibi had a more or less complete power of alienation and might have gifted the property to her husband, and his view on this point is in accordance with the answer to Question No. 64 in Bolster's Customary Law of Lahore District, in which it is stated that where daughters exclude agnates they have full rights of alienation, I hold, therefore, that the rule of reversion, for which Counsel for the respondent contends, does not apply in the present case. The only question is which of the parties is the heir to Muhammad Din, his half sister or his mother's father's brother. The defendant has produced no evidence to show that a mother's father's brother has any right of succession. The plaintiff, on the other hand, has given evidence of four instances in which a half sister has inherited. Three of these are mentioned by the witnesses Nizam Din, Chanan Din and Mehr Din, two of them being supported by mutation entries (Exs. P-4 and P-9), and the fourth instance is furnished by a mutation of 1894 (Ex. P-13). These instances which are unrebutted, are sufficient proof that a half sister is entitled to succeed.

I, therefore, accept the appeal, reverse the decree of the District Judge, and restore that of the First Court. The respondent will pay the appellant's costs in all Courts.

Z. K. *Appeal accepted.*

(1) 32 P. R. 1895 (F. B.).

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 10 OF 1923.

February 13, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

HOTCHAND UTTAMCHAND—DEFENDANT No. 1—APPELLANT

versus

TEJUMAL MULCHAND AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Jurisdiction—Accounts, suit for—Court, whether competent to pass decree in excess of pecuniary jurisdiction—Waiver, whether can confer jurisdiction.

In a suit in which a plaintiff is permitted to value his claim tentatively for purposes of Court-fees as, for instance, in a suit for settlement of accounts, and such valuation determines the jurisdiction, it is competent for the Court to pass a decree in his favour in excess of the pecuniary limits of its jurisdiction, provided it had jurisdiction to entertain the suit at its inception. [p. 353, col. 2; p. 354, col. 1.]

Case-law discussed.

No waiver or acquiescence of a party can confer jurisdiction on a Court which the Legislature has withheld and which it does not possess. [p. 357, col. 1.]

Rajlakshmi Dassee v. *Katyayani Dasee*, 12 Ind. Cas. 464; 38 C. 639, relied upon.

Appeal against the judgment and decree of the Joint Judge, Sukkur, dated the 25th November 1922, in Civil Appeal No. 54 of 1919.

Mr. *G. A. Kikla*, for the Appellant.

Mr. *Dipchand Chandumal*, for the Respondents.

JUDGMENT.—The material issues in this second appeal are:—(1) Whether in a suit for settlement of partnership accounts the Second Class Subordinate Judge was competent to pass a decree for an amount exceeding the limits of his pecuniary jurisdiction? and (2) Whether the defendant No. 1 (appellant) is estopped from challenging the decree of the lower Court?

The facts of this case fall within a narrow compass. The plaintiff (respondent No. 1), the defendant No. 1 (appellant) and the defendant No. 2 (respondent No. 2) carried on business in partnership upto 31st December 1918. Plaintiff and defendant No. 1 were both capitalist partners. The business was carried on by defendant No. 2 under the Superintendence of defendant No. 1, who was paid an extra share for his supervision. On 31st December 1918, defendant No. 1 ceased to do work, and the business was carried on by defendant No. 1 on behalf of himself and the plaintiffs though very little or no fresh work appears to have been done. The plaintiffs instituted two Suits Nos. 3 and 4 of 1912 in the Subordinate Civil Court, Sukkur, for settlement of partnership accounts in respect of the business done prior to and subsequent to 31st December 1908.

Defendant No. 1 was the chief accounting party as the assets of the business done prior to 31st December 1908 had come into his hands. The claims of the plaintiffs were resisted on several grounds, and were heard by the joint Subordinate Judge, Sukkur, having limited jurisdiction to try suits not exceeding Rs. 5,000 in value. After the two preliminary decrees were passed, the defendant No. 1 agreed to a consolidated report being submitted by the Commissioner appointed for taking accounts, and after consideration of the objections to the report, the Court of the first instance passed a final decree in favour of the plaintiffs only in the second suit for Rs. 8,200 including interest upto the date of the final decree, and for Rs. 917 as part of the Commissioner's fees and costs. In first appeal the lower Appellate Court varied the decree by awarding to the plaintiffs Rs. 8,640-4-5 inclusive of interest upto 24th May 1919, and costs of the lower Court, and also allowed further interest after that date and costs of the Appeal Court.

The competence of an inferior Court to pass a decree in excess of the pecuniary limits of its jurisdiction has been differently answered by different High Courts. The view of the Calcutta High Court as propounded by Mukerji, J., in *Golap Sundari Debi* v. *Indra Kumar Hazra* (1) is that the Court of limited pecuniary jurisdiction cannot pass a decree for an amount in excess of such limits, and that in suits where the plaintiff is permitted by law to value his claim tentatively for purposes of Court-fees and where such tentative value determines the value for purposes of jurisdiction, it is open to the Court to pass a decree for the amount found due to the plaintiff provided such amount does not exceed the pecuniary limits of the Court and the Court may in such a case remit any excess found due or presume the excess to be remitted. The learned Judge was of opinion that to take any other view would enable the plaintiff to commit a fraud upon the Court and upon the law which regulates

(1) 1 Ind. Cas. 86; 13 C. W. N. 493; 9 C. L. J. 367; 5 M. L. T. 360.

its jurisdiction and would forthwith lead to extraordinary complications, as it would be open to a plaintiff to value his claim for accounts at an insignificant sum, to have his case tried by the Court of the lowest jurisdiction and then to obtain a decree for a sum much in excess of the amount which the Legislature had fixed as the highest limit of the pecuniary jurisdiction of that Court, and it would also lead to a further difficulty of deciding the forum of appeal against such decisions. *Golap Sundari Debi's case* (1) has been followed and acted upon by the Calcutta High Court in *Panchoram Tekadar* v. *Kinu Haldar* (2), *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (3), *Sarada Sundari Basu* v. *Akramannessa Khatun* (4) and *Hirjibhai* v. *Jamshedji* (5), a Bench of the Bombay High Court consisting of Sir Basil Scott, C. J., and Beaman, J., have expressed their complete agreement with the view of Mukerji, J. On the other hand both the Allahabad High Court and the Madras High Court have taken a contrary view and have held that a Court of limited pecuniary jurisdiction is competent to pass a decree for an amount in excess of its pecuniary limits, provided it had jurisdiction to entertain the suit at its inception. *Madho Das* v. *Ramji Patak* (6), *Sudarshan Das Shastri* v. *Ram Pershad* (7), *Khudajiatul Kubra* v. *Amina Khatun* (8), *Ratnasawmi Chetty* v. *Ratnammal* (9) and *Putta Kannayya Chetti* v. *Rudrabhatla Venkata Narasayya* (10). *Prima facie* the theory propounded by Mukerji, J. in *Golap Sundari Debi's case* (1) would appear to be based on cogent reasons. It, however, presents certain difficulties which may best be illustrated by analysing the nature of a claim for settlement of partnership accounts as in the present suit. The rights of a partner of a dissolved firm have been admirably summed up in s. 39 of the Partnership Act, 1890, 53 & 54 Victoria, Ch. 39, as follows:—

"39. On the dissolution of a partnership every partner is entitled as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm, and for that purpose any partner or his representative may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

In most cases for settlement of partnership accounts the assets of the firm are in the possession of third parties, and the value of such assets exceeds the pecuniary limit of the Trying Court. It has not been suggested in any of the decided cases that the Court is not competent to appoint a Receiver to realise such assets or to order the Receiver to hand over such realisations to a successful plaintiff. But if by chance the defendant is able to delay the passing of the preliminary decree or the appointment of a Receiver and realises a portion of the assets pending suit, thereby rendering himself liable to pay a much larger amount than what he would have otherwise paid, or if some of the assets become irrecoverable since the suit, thereby increasing the liability of the defendant, and the total amount found due by him exceeds the pecuniary limit of the Court, can it be said that the plaintiff must be deemed to have relinquished his claim for the amount found due to him in excess of such pecuniary limit? In an ordinary suit for recovery of an ascertained sum of money the plaintiff is entitled to the incidental relief by way of interest from date of suit and costs over and above the amount of the Court's pecuniary jurisdiction. In a suit for partnership accounts the amount found due includes interest upto the date of the final settlement and costs incurred after the date of suit on realising the assets. Can the plaintiff be deemed to have relinquished such interest and costs.

In para. 8 of the plaint in this suit there was a definite averment that certain partnership outstandings remained to be recovered. In para. 11 of the plaint there

(2) 15 Ind. Cas. 252; 40 C. 56.
(3) 8 Ind. Cas. 34; 43 C. 650; 13 C. L. J. 132; 15 C. W. N. 506.
(4) 78 Ind. Cas. 747; 28 C. W. N. 710; 51 C 737; (1924) A. I. R. (C.) 783.
(5) 21 Ind. Cas. 783; 15 Bom. L. R. 1021.
(6) 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N. S.) 186.
(7) 7 Ind. Cas. 785; 7 A. L. J. 963; 33 A. 97.
(8) 80 Ind. Cas. 413; 46 A. 250; 22 A. L. J. 122; (1924) A. I. R. (A.) 388; L. R. 5 A. 142 Civ.
(9) 24 Ind. Cas. 135; 27 M. L. J. 388; 1 L. W. 446; 15 M. L. T. 415.
(10) 39 Ind. Cas. 439; 40 M. 1; 32 M. L. J. 221; 5 L. W. 580; (1917) M. W. N. 367.

was a prayer for their recovery and for preservation of the other assets of the firm. In para. 10 of the written statement there was a distinct admission that certain outstandings had not been recovered. No Receiver appears to have been appointed, and on account of the cantankerous conduct of the defendant, the passing of the preliminary decree and the final drawing up of the balance-sheet by the Commissioner appointed by the Court was considerably delayed. The suit was instituted in 1912. Both the decrees include interest and costs upto 1919 and presumably also include the amount of the outstandings which the defendant No. 1 had recovered or was held accountable for. The presumption of the plaintiffs having limited their claim to Rs. 5,000 can, therefore, hardly arise.

It may also be pointed out that certain Courts like the Subordinate Court, Sukkur, are presided over by a First Class Subordinate Judge who has unlimited precuniary jurisdiction. A Second Class Subordinate Judge is often deputed as Joint Subordinate Judge to relieve the congestion of the Court's board. Can it be presumed that in a suit valued at less than Rs. 5,000 and filed that in the Court of the First Class Subordinate Judge in the first instance a plaintiff must be deemed to have relinquished his claim for the excess amount if his case is disposed of by the Joint Subordinate Judge? The County Court's Act, 1888, 52 & 53 Victoria Ch. 43 provides separate and definite limits for different kinds of actions over which the County Court can exercise its jurisdiction. Section 56 of the Act provides for a limit of £ 50 in claims for recovery of debts, demands or damages, whether on balance of an account or otherwise. Section 58 extends the jurisdiction of the Court to the recovery of any demand not exceeding £ 50 as the unliquidated balance of a partnership account. Section 67 of the Act again deals with its jurisdiction in equity and confers on the Court the powers of a High Court in certain matters and by cl. (7) empowers of the Court to deal with actions for the dissolution or winding up of any partnership in which the whole partnership property does not exceed £ 500. There are appropriate provisions for other kinds of claims.

In Bombay Civil Courts Act XII of 1866 or the cognate Civil Courts pertaining to other provinces in India, no separate provision is made for the different kinds of actions which an inferior Court may try. Section 24 of the Bombay Act confers unlimited original jurisdiction over First Class Subordinate Judges, but it limits the jurisdiction of a Second Class Subordinate Judge to claims wherein the subject matter does not exceed in amount or value Rs. 5,000.

How the subject-matter of an unascertained claim or a claim other than one for recovery of money is to be valued, has been relegated by the Legislature to the Suits Valuation Act of 1887. Section 8 of this Act, *inter alia*, provides that the value of the subject-matter of a suit for partnership accounts for purposes of jurisdiction is the same as that determinable for the computation of Court-fees. This value is tentatively ascertained for purposes of Court-fees at the time of the institution of the suit, and if the value so ascertained for purposes of Court-fees is less than Rs. 5,000, the Second Class Subordinate Judge has indubitably jurisdiction to try and determine the subject-matter of the suit. There is no express provision in any of the Statutes declaring that when the Court is once seised of a case, it shall not grant relief either primary or incidental which the parties are found entitled to or that it shall be limited to passing a decree for recovery of an amount not in excess of Rs. 5,000.

English cases based on the County Courts Act which contains express provisions limiting the subject-matter of a claim in a suit for settlement of partnership accounts to £ 500 or limiting the recovery of a demand for an unascertained balance of a partnership account or of a demand for an ascertained sum to £ 50 can have very little bearing. The cases of *Isaacs* v. *Wyld* (11) and *Hill* v. *Swift* (12) refered to in *Hirjibhai* v. *Jamshedji* (5) can hardly be relied on for holding that a Court in India may not pass a decree in excess of the subject-matter of a suit as determined by the technical rules laid down by the Suits Valuation Act. They are, however, authority for holding that in the absence of the consent of the plaintiff. It is not open to the Judge to strike out a part of the claim of the plaintiff in excess of the pecuniary limits of the Court, and that no presump-

(11) (1851) 21 L. J. Ex. 46; 7 Ex. 163; 15 Jur. 1135; 155 E. R. 900.

(12) (1855) 24 L. J. Ex. 137; 10 Ex. 726; 3 C. L. R. 724; 1 Jur. (N. S.) 167; 3 W. R. 171; 156 E. R. 632; 102 R. R. 793.

tion can, therefore, arise that the plaintiff has impliedly relinquished such excess by merely instituting his suit in a Court of limited jurisdiction.

The argument that unless it is presumed that the plaintiff had relinquished a part of his claim, or unless it is held that the inferior Court cannot pass a decree for an amount in excess of its pecuniary limits, would enable the plaintiff to commit a fraud on the Court and leave it open to the plaintiff to have case tried by inferior Court by valuing his claim at an insignificant amount may be successfully put in different ways. In the first place it is always open to the defendant to challenge the valuation at the proper time and for the Court to afford him adequate relief, if the Court finds that the plaintiff has intentionally undervalued the claim.

It would also appear that in certain cases even where the plaintiff has properly valued his relief the Court is called upon to adjudicate upon the claims of the defendants *inter se* or the claim of the defendant against the plaintiff in respect of amounts far in excess of its pecuniary limits. A suit by *A* against *B* and *C* for settlement of partnership accounts may result in a decree being passed in favour of *A* against *B* for Rs. 5,000 or less and in favour of *C* against *B* for a sum in excess of Rs. 5,000, or may result in decrees being passed against *A* in favour of *B* and (or) *C* in excess of Rs. 5,000. Could it then be said that the Court should stay its hands and not do equities between the parties or refer *B* or *C* to a separate suit? In suits for partition of property, notwithstanding certain dissentient rulings of the Calcutta High Court, it has been held that the value of the share claimed by the plaintiff determines the jurisdiction of the Court. The share of the plaintiff is often insignificant in comparison to the shares of the defendants *inter se*, and it is open to any of the defendants to claim a partition of his share in the case suit. To refer him to a separate suit can only lead to multiplicity of proceedings not warranted by the law.

Not only the Legislature has not purported to put a limit on the nature of the decree which may be passed by a Court when it has rightly assumed jurisdiction over the *lis*, but it would appear that the Legislature had in view cases where in consequence of an under-valuation or an over-valuation the case may be tried by a Court of inferior or superior grade. Under s. 11 of the Suits Valuation Act such under or over-valuation under certain circumstances is treated not as an illegality depriving the Court of its jurisdiction, but as an irregularity which may be cured.

The mere change of forum consequent to under-valuation has been held, and rightly, by itself not to affect prejudicially the disposal of the suit on merits and to have been intended to be so provided for by s. 11 of the Suits Valuation Act. The appeal from a Second Class Subordinate Judge lies to the District Judge or to a First Class Subordinate Judge with appellate powers, who both have unlimited original jurisdiction. No serious prejudice can, therefore, ordinarily result to a litigant, if the dispute is ultimately placed before such higher Tribunal for final disposal. It would also appear that if an appeal is a continuation of the suit, no difficulty should arise in determining the forum of the appeal. If the suit has been tried by the Judge as a Second Class Suit, the appeal would lie to the Judge who ordinarily hears appears against the decisions of a Second Class Sub-Judge.

The Calcutta decision though approved of to a certain extent by the Rangoon and the Patna High Courts does not appear to have been followed in its entirety. In *Hardayal* v. *Ram Deo* (13), Robinson, C. J. and Brown, J., were of the opinion that though the Sub-Divisional Court could not pass a decree for an amount in excess of Rs. 5,000 the plaint could be returned for presentation to the proper Court. The theory of the intentional relinquishment of the excess claim does not appear to have been referred to.

In *Satya Kinkar Sahana* v. *Shiba Prasad Singh* (14), Jwala Prasad, J., distinguished the case of *Golap Sundari Debi* v. *Indra Kumar Hazra* (1), by holding that though a Munsif cannot pass a decree in excess of his pecuniary jurisdiction where he either dismisses the suit or awards a sum below its pecuniary limits, it is open to the Appellate Court to allow in appeal sum far in excess of such pecuniary limits.

It is, however, difficult to follow this nice distinction, or to hold that the Appellate Court may not likewise pass a decree for an amount in excess of the pecuniary juris-

(13) 86 Ind. Cas. 568; 2 R. 408 at p. 411; 3 Bur. L. J. 207; (1924) A. I. R. (R.) 354.

(14) 52 Ind. Cas. 452; 4 P. L. J. 447; (1920) Pat. 17.

diction of the Trial Court where the Trial Court has passed a decree for an amount in excess of its limits. One of the logical conclusions resulting from the view taken by the Calcutta High Court is that in a suit for recovery, *inter alia*, of mesne profits pending suit, the Court may not pass a decree for such mesne profits in excess of its limits; *cf. Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (3). This case, however, has been distinguished in *Dinanath Sahai* v. *Mayawati Kuer* (15), on the ground that O. XX, r. 12, C. P. C., expressly authorises the Trying Court to determine such mesne profits and thereby confers jurisdiction on the Court to pass a decree in excess of its limits.

We are indebted to the eminent Judge, Mookerji, J., for a collection of the different definitions of "Jurisdiction" referred to by him in *Hridyanath Roy* v. *Ram Chandra Barua Sarma* (16), but none of those definitions goes so far as to to provide what decree a Court may or may not pass, when it is once seised of the matters in dispute between the parties.

Assuming that it is doubtful if the Legislature did intend to confer jurisdiction on the Court to pass a decree in excess of its pecuniary limits, the old maxim *boni judicis est ampliare jurisdictionem* should apply and the Court should exercise such jurisdiction and pass such decree as the circumstances require so as to prevent a failure of justice which may otherwise result.

With all due respect to the eminent Judges who are responsible for the contrary view, we venture to think that the Second Class Subordinate Judge was competent to pass the decree in suit.

The second question, therefore, hardly arises. We may, however, observe that if the Second Class Subordinate Judge had no jurisdiction to pass the decree in suit, no waiver or acquiescence of the defendant could confer jurisdiction on the Court which the Legislature has withheld and which it does not possess: *Rajlakshmi Dassee* v. *Katyayani Dasee* (17) and that it would be necessary for us either to give the plaintiff an opportunity of giving up his claim for the excess amount or to have the accounts in this suit taken separately.

(15) 60 Ind. Cas. 346; 6 Pat L. J. 54; 2 P. L. T. 143; (1921) Pat. 69.

(16) 58 Ind. Cas. 806; 24 C. W. N. 723 at p. 732; 31 C. L. J. 482; 48 C. 138.

(17) 12 Ind. Cas. 461; 38 C, 639.

On the merits, we are not satisfied that the defendant No. 1 has any case. The defendant No. 1 had the supervision of the business and if he permitted defendant No. 2 to allow the accounts prior to 1909 to fall into a mess or permitted his clerks to do the same after 1909, he has to thank himself for it. He withdrew his own capital several years ago and has successfully prevented the plaintiffs from the use of their capital. He has been made to pay interest at six per cent. per annum though the usual mercantile rate is far in excess of six per cent. The defendant No. 1 has not been dealt with unfairly.

We would, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 11 OF 1924.

April 28, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Musammat BASANTI BAI—APPLICANT—APPELLANT

versus

NANHE MAL AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 53—Transfer by insolvent—Application to avoid transfer—Official Receiver, whether necessary party—Report of Official Receiver, whether admissible—Burden of proof.

The report of the Official Receiver in connection with an enquiry under s. 53 or 54 of the Provincial Insolvency Act is not by itself legal evidence on which a finding as to the validity of the transaction can be based. [p. 358, col. 2.]

It is the Official Receiver at whose instance an enquiry into the fictitious nature of a transaction under s. 53 of the Provincial Insolvency Act should be made and it is the Official Receiver who should be treated as the principal party representing the whole body of the creditors in such a proceeding. [*ibid.*]

Jhabba Lal v. *Shib Charan*, 37 Ind. Cas. 76; 39 A. 152; 15 A. L. J. 1, *Ram Sundar Ram* v. *Ram Charit Bhakat*, 79 Ind. Cas. 326; 51 C. 663; (1924) A. I. R. (C.) 827 and *Gontu Appireddi* v. *Gontu Chinna Appireddi*, 66 Ind. Cas. 271; 45 M. 189; 14 L. W. 639; 41 M. L. J. 606; (1921) M. W. N. 816; (1922) A. I. R. (M.) 246, relied on.

In such a proceeding the burden lies on the person who tries to bring himself within the exception by asserting that he is a purchaser or encumbrancer in good faith and for valuable consideration. [p. 359, col. 1.]

Hemraj Champa Lall v. *Ramkishen Ram*, 38 Ind. Cas. 369; 2 P. L. J. 101; 1 P. L. W. 752; (1917) Pat. 303 and *Muhammad Habibullah* v. *Mushtaq Husain*, 37 Ind. Cas. 684; 39 A. 95; 14 A. L. J. 1183, relied on.

First appeal from an order of the District Judge, Farrukhabad, dated the 26th October 1923.

Dr. *S. N. Sen*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is an appeal by a claimant *Musammat* Basanti Bai arising out of certain insolvency proceedings. On an application presented by a creditor of the Firm of Nanhe Mal the firm, which was owned by Nanhe Mal and his three sons including Raj Narain the youngest was adjudicated an insolvent on the 9th of October 1922. On the 21st of April 1922 and the 11th of May 1922 Raj Narain had transferred by two registered sale-deeds two houses which had been previously acquired in his name, to *Musammat* Basanti Bai, the appellant. The first deed was for Rs. 800 and the second one for Rs. 2,500. The entire sale considerations of these two deeds were paid before the Sub-Registrar.

Jugal Kishor one of the creditors put in an application on the 22nd of February 1923 before the Court stating that the two houses which had been ostensibly sold in April and May 1922 were part of the assets of the insolvent firm and should be attached by the Receiver. This application was sent to the Official Receiver with directions to take proceedings after an enquiry. The Receiver submitted a report on the 6th of April 1923 stating that the case of the applicant that these two transfers were fictitious was supported by a number of witnesses. In his report he expressed the opinion that the transfers in question did not appear to have been made in good faith or for valuable consideration.

Apparently the learned District Judge did not treat the Receiver as a party to these proceedings. The proceedings were initially started by Jugal Kishor one of the creditors and the order passed by the Judge and the formal order prepared by his office show that Jugal Kishor was represented as the applicant in the proceedings. It does, however, appear that the Receiver on behalf of the creditors was allowed to cross-examine the witnesses produced by *Musammat* Basanti Bai. The formal order which was prepared did not contain the name of the Receiver in the array of the parties at all, with the result that when the appellant filed her appeal in this Court she did not implead the Receiver.

The learned Judge had not before him either the statement on oath of the Receiver or of the creditor or even of any of the witnesses mentioned in the Receiver's report. He had, however, the report of the Receiver which he treated as part of the evidence in the case. In our opinion the report of the Official Receiver in connection with an enquiry under ss. 53 or 54, of the Provincial Insolvency Act is not by itself legal evidence. It is to be noted that wherever it was intended by the Legislature that the report of an Official Receiver should be treated as evidence in the case, an express provision is made in the section dealing with that matter. We may draw attention to ss. 38 and 42 of the Provincial Insolvency Act. No such provision, however, is to be found in ss. 53 and 54. We must, therefore, hold that the report of the Official Receiver is not *per se* a legal evidence on which a finding could be based.

We also must hold that it is the Official Receiver at whose instance an enquiry into the fictitious nature of the transaction should have been made and it was the Official Receiver who should have been treated as a principal party representing the whole body of the creditors. It was held so in the cases of *Jhabba Lal* v. *Shib Charan* (1), *Ram Sundar Ram* v. *Ram Charit Bhakat* (2), *Gontu Appireddi* v. *Gontu Chinna Appireddi* (3) and *Hemraj Champa Lall* v. *Ramkishen Ram* (4).

Further more, it is impossible to finally dispose of the case in the absence of the Receiver. We cannot set aside the order of the District Judge and uphold the transfers behind the back of the Receiver. The appeal without impleading him is incompetent. We have, however, mentioned the reason why his name has been omitted from the memorandum of appeal.

Having considered the case we have come to the conclusion that the best thing to do is to set aside the order of the District Judge and remand the case to his Court

(1) 37 Ind. Cas. 76; 49 A. 152; 15 A. L. J. 1.

(2) 79 Ind. Cas. 326; 51 C. 663; (1924) A. I. R. (C.) 827.

(3) 66 Ind. Cas. 271; 45 M. 189; 14 L. W. 639; 41 M. L. J. 606; (1921) M. W. N. 816; (1922) A. I. R. (M.) 246.

(4) 38 Ind. Cas. 369; 2 P. L. J. 101; 1 P. L. W. 752; (1917) Pat. 303

with a direction that the Receiver should be formally impleaded and that he should be allowed to produce any oral or documentary evidence he may like to produce. As, however, the Receiver had an opportunity of cross-examining the witnesses produced by *Musammat* Basanti Bai it seems useless to direct that her evidence should be tendered *de novo*.

As we are of opinion that the burden of proof, when it was admitted that these transfers took place within two years of the adjudication, lay upon the alleged transferee *Musammat* Basanti Bai, she would have no right to produce rebutting evidence. But under the circumstances we would allow her to produce supplementary evidence in the first instance if she is so advised. Section 53 of the Provincial Insolvency Act provides that any transfer of property not being a transfer.....made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall etc. It seems to us that the burden lies on the person who tries to bring himself within the exception by asserting that he was a purchaser or incumbrancer in good faith and for valuable consideration. This was the view taken by this Court in the case of *Muhammad Habibullah* v. *Mushtaq Husain* (5) and by the Patna High Court in the case of *Hemraj Champa Lall* v. *Ramkishen Ram* (4).

The result, therefore, is, that this appeal is allowed and the order of the District Judge is set aside and the case sent back to his Court for disposal in accordance with the directions given above. Costs will abide the event including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

(5) 37 Ind. Cas. 684; 39 A. 95; 14 A. L. J. 1183.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 95 OF 1924.

March 2, 1925.

Present:—Mr. Daniels, J. C.

ABDUL RAHMAN KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat NOOR JAHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—Additional evidence, admission of—Evidence, discovery of, after decision in Trial Court.

A suit for redemption was dismissed on the ground that the mortgage was not proved. In appeal the mortgagor put in an affidavit stating that after the decision of the case by the Trial Court he had discovered that the mortgage was a registered one and had obtained a copy of the mortgage-deed from the Registration Office which he desired to produce in evidence. The Court was satisfied that the document had not been intentionally withheld:

Held, that the case fell within the provisions of r. 27 of O. XLI of the C. P. C., and that the copy of the mortgage-deed could be admitted in evidence in appeal.

Appeal from a decree of the Subordinate Judge, Sultanpur, in Appeal No. 198 of 1923, dated the 1st of December 1923, confirming that of the Munsif, Musafirkhana, dated the 28th of September 1923.

Mr. *M. Wasim*, for the Appellants.

Messrs. *Niamat Ullah* and *Saiyed Husain Zaidi*, for the Respondents.

JUDGMENT.—This was a suit for redemption of an old mortgage. The suit has been dismissed by both the Courts below on the ground that the mortgage was not proved. The appellants have put in an affidavit stating that after the decision of the case by the Court below they have discovered that the mortgage was registered and have obtained a copy from the Registration Office at Fyzabad which they desire to put in. At the time when the document was executed the registration of documents was not compulsory in Oudh. The appellants state in their affidavit that they searched the Registration Offices at Jagdishpur, the *pargana* to which the property belongs, and Sultanpur and Rae Bareli (Jagdishpur was at one time in the Rae Bareli district) without finding any trace of registration and concluded that the document had not been registered. It was only after the decision of the case that they received information that led them to search at Fyzabad. It is true, as the respondents' Counsel points out, that under existing rules the registration records of Jagdishpur would in the ordinary course be transferred to Fyzabad after twelve years, but having regard to the date when the deed was executed and to the fact that the registration of documents was not then compulsory in Oudh, I see no sufficient ground for thinking that the document has been intentionally withheld. Under the ruling of their Lordships of the Privy Council in *Indrajit Pratap*

Bahadur Sahi v. *Amar Singh* (1), the provisions of O. XLI, r 27 apply to a case like this. The appellants are willing to pay the expenses of the respondents incurred up-to-date. In the Trial Court an issue was framed as to the existence of one Ashik Ali who was nearer in degree to the mortgagor than the appellants. Ashik Ali was presumed to be dead as he had not been heard of for seven years. The respondents file an affidavit stating that they have now received information that he is alive and available and ask that if the case is re-opened this issue may also be re-opened. This request is reasonable and I allow it. Subject to the appellants depositing within one month the costs incurred by the respondents up-to-date the appeal is allowed, the decree of the Court for re-trial after allowing fresh evidence on Issues Nos. 1 and 3. The finding on Issues Nos. 2 and 4 will not be re-opened. If the appellants fail to deposit the amount of costs within the time allowed the appeal will stand dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 74 Ind. Cas. 747; 50 I. A. 183; 2 Pat. 676; 21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 Pat. L. R. 345; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 728; 25 Bom. L. R. 1259; 28 C. W. N. 277; 39 C. L. J. 318 (P. C.).

LAHORE HIGH COURT.

CIVIL APPEAL No. 2134 OF 1923.

January 31, 1924.

Present:—Mr. Justice LeRossignol.

KAURA LAL—DEFENDANT—APPELLANT

versus

THE PUNJAB NATIONAL BANK, LTD., MULTAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 9, O. XXI, r. 90, O. XLIII, r. 1 (c)—Execution of decree—Sale, objections to—Dismissal in default—Order refusing to restore objections—Appeal, whether lies.

Section 141 of the C. P. C. does not apply to proceedings in execution.

An order refusing to restore objections made to an execution sale dismissed in default is not open to appeal.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Multan, dated the 16th July 1923.

Lala *Durga Das*, for the Appellant.

Lala *Hargopal*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Executing Court refusing to restore objections by the judgment-debtor under O. XXI, r. 90, C. P. C. When the objection to the auction sale, was called for hearing, the objector was absent and the objections were dismissed for default. On the same day the objector put in an application for restoration of his objections on the ground that he had been busy engaging another Pleader, but the Court below refused to restore the objections on the ground that the objector was intentionally causing delay.

A preliminary objection is raised that no appeal from such an order lies. For the appellant it is contended that O. IX, r. 9 does apply by virtue of s. 141 of the Code, and refers to *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (1). There is, however, a long series of authorities in support of the proposition that s. 141 does not apply to proceedings in execution, and that is my own view. Another argument advanced on behalf of the appellant is that the order is appealable as a decree, but no order of dismissal comes within the definition of a decree. For these reasons I hold that the order complained of is not subject to appeal, and I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 29 Ind. Cas. 395; 19 C. W. N. 758.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 185 OF 1924.

July 10, 1925.

Present:—Mr. Simpson, A. J. C.

SIDHNATH AND OTHERS—PLAINTIFFS—APPLICANTS

versus

SHEO DAYAL AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Oudh Rent Act (XXII of 1886), s. 108 (16)—Rent-decree passed against under-proprietors, satisfied by one of them—Contribution, suit for, whether cognizable by Civil Court—Jurisdiction of Civil and Revenue Courts.

Every suit for contribution founded upon the satisfaction of a joint decree by the plaintiff is cognizable by a Civil Court.

Plaintiffs and defendants were joint under-proprietors of a village. The superior proprietor filed a suit for arrears of rent against them in the Rent Court and obtained a decree. He executed this decree against the plaintiffs only. Consequently the plaintiffs

brought a suit for contribution against the defendants. One of the plaintiffs was a *lambardar*;

Held, that the payment in respect of which the suit had been brought having been made by the plaintiffs in execution of a decree, the suit did not fall within the purview of s. 108 (16) of the Oudh Rent Act and was not, therefore, excluded from the cognizance of a Civil Court.

Application for revision against an order of the District Judge, Rai Bareli, dated the 15th September 1924, confirming that of the Subordinate Judge, Rai Bareli, dated the 17th September 1923.

Messrs. *Niamatullah* and *Naimullah*, for the Applicants.

Mr. *Ram Bharose Lal*, for the Opposite Party.

JUDGMENT.—This is an application under s. 115 of the C. P. C. The question is one of jurisdiction, so the first thing to look at is the plaint. There were two plaintiffs, Sidh Nath and Bindraban. The plaint set forth that plaintiffs and defendants were joint under-proprietors of the village of Shahzadpur and that the superior proprietor filed a suit for arrears of rent in the Rent Court and obtained a decree. He executed this decree (as he was entitled to do, the decree being joint) against the plaintiffs only. Consequently the plaintiffs brought a suit for contribution against the other under-proprietors. It so happens that plaintiff No. 2 Bindraban is a *lambardar*. Accordingly it was pleaded in the Court of the Subordinate Judge that s. 108 (16), of the Oudh Rent Act applied and that this was a suit by a *lambardar* against a joint *lambardar* for compensation for revenue or rent paid by the *lambardar* on account of the joint *lambardar*. This plea was given effect to and the plaint was returned by the learned Subordinate Judge for presentation to the proper Court. The plaintiff appealed to the learned District Judge, who dismissed his appeal taking the same view as the Court of first instance. No second appeal lies. Accordingly the plaintiff has come to this Court in revision claiming that the Courts below have failed to exercise a jurisdiction vested in them by law.

The order they wish this Court to pass is to set aside the orders of the Courts below and to send the case back to the Subordinate Judge for decision. The opposite party does not object to this course, but his Counsel points out that consent of parties cannot confer jurisdiction, and expresses his own opinion as a lawyer that the case does fall under s. 108 (16) of the Oudh Rent Act. In my opinion the case was rightly brought in the Civil Court. The fact that a decree was obtained and was executed alters the nature of the present suit. No doubt if the plaintiffs had made this payment simply on demand and not in order to satisfy the decree, their suit for contribution would have lain in the Revenue Court, but the right of the superior proprietor to obtain rent from the under-proprietors or from their *lambardars* had merged in his decree. The only rights he possessed were to execute the decree. Every suit for contribution founded upon a decree is cognizable by the Civil Court. There is a decision of this Court which has some bearing on the case of *Suraj Baksh Singh* v. *Raghubar Singh* (1). The question which was decided in that case was whether a suit for contribution brought by one under-proprietor against others in respect of the decree which he had satisfied, was cognizable by the Small Cause Court or by the Munsif. The question of the jurisdiction of the Revenue Court was not considered, but if the learned Judge had believed that the case was exclusively cognizable by the Revenue Courts he would have said so. It is true that in that case it does not appear whether either of the parties was a *lambardar*. But it was held in that case that the fact that there was a decree took the suit out of Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act (IX of 1887). It is by exactly similar reasoning that I arrive at the result that the existence of a decree here takes the case out of s. 108 (16) of the Oudh Rent Act.

I, therefore, allow the application and set aside the order of the Courts below. The record will be sent back through the District Judge to the Subordinate Judge who will proceed to decide the case according to law. No order as to costs.

Z. K. *Application allowed.*

(1) 24 Ind. Cas. 28; 1 O. L. J. 344.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 443 OF 1923.

December 17, 1924.

Present:—Mr. Justice Lentaigne.

MAUNG AUNG GYAW AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUTHIYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal—Finding of Trial Court based on oral evidence, whether can be disturbed—Practice—Claim

based on agreement alleged to be fraudulently detained by opponent—Duty of Court.

A claim based on an agreement which is not produced and is alleged to have been fraudulently detained by an opponent is always one which should be regarded with extreme suspicion and closely examined in every aspect before it is accepted. [p. 362, col. 2.]

Where a Trial Court has completely failed to discuss the various improbabilities and suspicions attaching to the oral evidence of certain witnesses, an Appellate Court is entitled to disregard the finding arrived at by the Trial Court on the basis of such evidence and to arrive at a finding of its own on an independent consideration of the evidence. [*ibid.*]

Appeal against a decree of the District Court, Myaungmya, in Civil Appeal No. 72 of 1923.

Mr. *Ba Thein*, for the Appellants.

Mr. *Barnabas*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants admittedly mortgaged the land in suit to the first respondent Muthiya for Rs. 450 in 1918 by a deed which stipulated that redemption be effected within four years. They again admittedly mortgaged the land to Muthiya with possession for Rs. 700 in 1919 under a deed which contained a clause for the forfeiture of the land if not redeemed within two years.

On the 11th March 1920 the plaintiffs-appellants executed and registered the deed (Ex. D) by which they purported to sell the land outright to the defendants for Rs. 1,600. The appellants now allege that on the occasion when this last deed was executed the defendants also executed an unregistered agreement agreeing to sell the land back to the plaintiffs-appellants for the same price of Rs. 1,600 within three years: and the present suit is one for specific performance of such agreement.

The appellants, however, are unable to produce such agreement and they account for its absence by an allegation that it was fraudulently detained by Muthiya. They allege that Muthiya had leased the land to the appellant Maung Aung Gyaw for 300 baskets of paddy, that when Maung Aung Gyaw was unable to deliver more than 240 baskets of paddy out of this rent, Muthiya persuaded him to deposit the agreement as security for the balance of 60 baskets of paddy or its equivalent in value Rs. 70 and that when Maung Aung Gyaw offered to re-pay the Rs. 70 Muthiya at first put him off and then on the following day informed him that he had torn up the agreement and then again verbally promised to sell on the same terms as in the agreement.

The Trial Judge believed plaintiffs' evidence on these points and granted plaintiffs a decree for specific performance of the agreement to re-sell the land on payment of the price of Rs. 1,600; but, on appeal, the District Judge reversed that decree and dismissed the plaintiffs' suit with costs after an elaborate discussion of the evidence in the case and setting forth his reasons for rejecting the story of the plaintiffs as to this agreement, etc.

The present second appeal is against that decision and it is urged that the decision of the Trial Judge should be accepted, as that Judge had seen the witnesses and believed their evidence and that his decision should not have been so lightly set aside by the lower Appellate Court. In this respect reliance is placed on the recent decision of the Privy Council in the case of *Ma Than Than* v. *Ma Pwa Thit* (1). I think, however, that the District Judge has given sound reasons for disregarding the findings of the learned Trial Judge who had completely failed to discuss the various improbabilities in the story of the appellant. Moreover, the remarks of the Privy Council in the case so referred to had reference to a witness who had been examined at very great length and had been severely cross-examined by an able Advocate and whose credibility had been specially commented on, discussed and accepted by the Honourable Judge who had tried the case. In my opinion these remarks should be read with reference to such special aspects of that case and should not be treated as having a too general application.

In the case now before me I agree with the learned District Judge in regarding the story of the appellants as very improbable and as one shown to be incredible by the actions of the appellant. A claim to recover on an agreement which is not produced and is alleged to have been fraudulently detained by an opponent is always one which should be regarded with extreme suspicion and closely examined in every aspect before it is accepted. In the present case the appellants were bound to allege that the missing agreement was written by the writer of the original deed which was executed on the date of the alleged agreement and is now alleged to have been the occasion for such agreement; but such

(1) 77 Ind. Cas. 63; 1 R. 451; (1923) A. I. R. (P. C.) 156; 33 M. L. T. 361; 2 Bur. L. J. 260; 46 M. L. J. 334; (1923) M. W. N. 711; 29 C. W. N. 610 (P. C.).

writer denies all recollection of any such agreement and no satisfactory reason has been shown why he should forget it or be in collusion with the respondent. It is admitted that the agreement was not prepared at the same time as the original sale-deed, and it is alleged that the agreement was drafted subsequently to the drafting of the sale-deed on the same morning at the Court House and not at the house where the deed was prepared, which facts would indicate that the proposal to have such agreement was an afterthought if it was made at all. The sale-deed shows that a Madrasee witness attested the original deed, but it is not alleged that any Madrasee witness attested the missing agreement though one would expect to find the same attesting witnesses to both documents.

Then it is extremely improbable that the appellants would be so extremely foolish and stupid as to hand over such agreement to the defendant, the person who had executed it. Moreover, both parties would necessarily have realized the absurdity of handing over such agreement as a security when obviously it could be of no value at all except to the intended purchaser and would not be security for anything. Then the evidence as to the alleged conversations as to explanation for not returning the agreement to the appellant is not at all convincing. Muthiya is described as being then willing to promise to allow re-purchase on the same terms as in the agreement, but he was not asked to execute a new agreement, which would have been the sensible manner of renewing the agreement. He is described as informing the appellant that he had torn up the agreement but the appellant also omitted to take any of the other steps which any ordinary man would take on receiving such a communication. He did not report the fact to any Headman or to the Police and he remained content with a mere oral assurance from a man whose action as described would indicate an intention to cheat him.

Then the appellant waits for more than another year before claiming a re-purchase or instituting any suit. When he first comes forward to assert his claim, the value of the land had admittedly increased to such an extent as would constitute a strong motive for a false claim. It is admitted that the value was previously only Rs. 50 per acre and that it had then increased to Rs. 200 per acre. It is obvious that such an increase in value would excite cupidity and constitute a strong motive for a false claim to recover the land. Finally it is admitted that the agent who instituted and conducted the suit for the appellants had in fact purchased half the land on the terms that he would finance the suit.

All these points raise the gravest suspicion against the case of the appellants. These points were ignored by the learned Trial Judge and I agree with the conclusion come to by the learned District Judge that the case of the appellants cannot be treated as proved by the evidence now before the Court. I have carefully perused all that evidence and I do not find it convincing. For these reasons, I see no ground to interfere and I dismiss this second appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 537 OF 1923.

January 23, 1924

Present:—Mr. Justice Moti Sagar.

AMRITSARIA—PLAINTIFF—PETITIONER

versus

GAMUN—DEFENDANT—RESPONDENT.

Practice—Suit instituted on behalf of major treated as minor—Amendment—Limitation, expiry of, effect of—Limitation Act (IX of 1908), s. 22.

A suit was filed on behalf of a minor plaintiff and the plaint was signed and verified by the next friend of the minor. During the pendency of the suit it transpired that the plaintiff was not a minor and the plaint was allowed to be amended and the next friend's name was removed from the record. By the time that the amendment was made the period of limitation for the suit had expired :

Held, that the suit could not be dismissed as barred by time merely by reason of the fact that the plaint had not been signed and verified by the plaintiff on the date when it had been originally instituted.

Petition, under s. 25 of the Small Cause Courts Act, for revision of the decree of the Subordinate Judge, Third Class, exercising the powers of a Judge, Small Cause Court, Nawanshahr, District Jullunder, dated the 12th March 1923.

Mr. *B. D. Qureshi*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—I am of opinion that

this application must succeed. The learned Judge of the Court below following *Sheorania* v. *Bharat Singh* has dismissed the plaintiff's suit holding that the amendment of the plaint was improper and that the claim was time-barred. The suit was originally instituted in the name of the present plaintiff Amritsaria. He was, however, shown in the plaint as a minor and the plaint was signed and verified by his father Dheru who was acting as his next friend. It subsequently transpired that the plaintiff Amritsaria was a major at the time when the suit was instituted and his father Dheru had no authority to act on his behalf. The plaint was then amended and Dheru's name was removed from the record. The learned Judge of the Court below has held that the person who signed and verified the plaint was not duly authorized by Amritsaria in that behalf and that there was no proper presentation of the plaint. He has also found that when the plaint was amended, the suit had become barred by limitation and he accordingly dismissed it with costs.

In my opinion the learned Judge of the Court below has not taken a correct view of the matter and his decision ought to be set aside. When the learned Judge found that the plaintiff was not a minor, he very rightly gave an opportunity to the latter to amend his plaint and to elect whether he would proceed with the suit or not. But the plaint having been amended Amritsaria should have been allowed to go on with the case and the suit should not have been dismissed merely because the plaint had not been signed and verified by him on the date when it had originally been instituted. If the decision of the lower Court is upheld the result would be that the plaintiff would lose the whole of his cause of action.

I accept the petition and return the case to the lower Court for decision on the merits. No order as to costs in this Court.

Application accepted;
Case remanded.

Z. K.

(1) 20 A. 90; A. W. N. (1897) 203; 9 Ind Dec. (N. S.) 417.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 420 OF 1924.

May 6, 1925.

Present :—Mr. Justice Sulaiman and Mr. Justice Daniels.

MOHAMMAD MAZHAR ALI—DECREE-HOLDER—APPELLANT

versus

Musammat BIGGHA BEGAM—JUDGMENT-DEBTOR—RESPONDENT.

Pensions Act (XXIII of 1871), ss. 7 (2), 11—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Mortgage of pension—Mortgage decree—Execution of decree—Objection that pension is not liable to sale, whether can be entertained—Attachment, whether necessary—Pension entered in register under s. 7 (2) of Pensions Act, whether exempt from sale—Appeal, second—Question of law and fact.

The question whether a certain pension is of such a character as not to be liable to be sold in execution of a decree is a mixed question of law and fact and can be gone into in second appeal. [p. 365, col. 2.]

Where in answer to a mortgage suit the defendant raises the point that a certain pension which forms part of the mortgaged security is not liable to sale and the point is decided against the defendant and a decree is passed under O. XXXIV, r. 5 of the C. P. C., for the sale of the pension, it is no longer open to the judgment-debtor to contend in execution of the decree that the pension is of such a character as not to be saleable at all. It would not be proper for the Execution Court to re-open the question which has already been decided in the suit itself. [*ibid.*]

Where a decree is passed under r. 5 of O. XXXIV of the C. P. C., there is no question of "attachment" of the property directed to be sold. The only question before the Executing Court is whether the charge is enforceable against the property sought to be sold. [p. 366, col. 1.]

A pension entered in the register containing a list of pensions coming under s. 7 (2) of the Pensions Act, is not exempt from sale in execution of a decree. [*ibid.*]

Execution first appeal from a decree of the Subordinate Judge, Moradabad, dated the 30th July 1924.

Mr. *Hamid Husain*, for the Appellant.
Mr. *S. Raza Ali*, for the Respondent.

JUDGMENT.—This is a decree-holder's appeal arising out of certain execution proceedings. In 1889 *Musammat* Kundan who owned certain properties and was entitled to a pension from Government, executed a usufructuary mortgage of all these properties including the pension in favour of certain mortgagees. She took possession of the properties under a lease from the mortgagees and for the due payment of rent she executed another mortgage-deed by way of security in which that pension was again included. The previous mortgage-deed was paid off; but a suit was

brought on the basis of the second one and a decree obtained against the representatives of the mortgagor. Mazhar Ali was a purchaser of part of the mortgaged properties, and so was the respondent Biggha Begam. It appears that Mazhar Ali had to pay more than his due share in order to save his property from being sold, and having done so instituted a suit for contribution against Biggha Begam and certain other judgment-debtors. In this suit he claimed that he was entitled to enforce his claim against the portion of the pension purchased by *Musammat* Biggha Begam on which he had a charge. The suit was first decided by Ch. Abdul Hasan, who decided Issues Nos. 1 and 6 relating to the question whether the pension in dispute was or was not saleable, in favour of the plaintiff. He ordered that a decree under O. XXXIV, r. 4 should be prepared for recovery of the amount out of the properties in the hands of the various defendants. An appeal was preferred to the High Court and that judgment was set aside and the suit was remanded to the Court of first instance. This time the suit was disposed of by Mr. Ram Chand Saksena, who decreed the claim *against the properties purchased by the various defendants* as detailed in the plaint. He added that the amount decreed will be a charge on the properties purchased by the defendants. He further directed that a decree should be prepared according to r. 4 of O. XXXIV, C. P. C. six month's time being allowed for payment. The learned Subordinate Judge seems to have accepted the findings arrived at by his predecessor, although the whole suit had been remanded, and he only dealt at length with the question of the proportionate liability of the various defendants. The decree-holder appealed to the High Court, and *Musammat* Biggha Begam and another defendant filed certain cross-objections. By the judgment of the High Court the amounts were slightly varied, but the decree was not set aside; nor was the order of the Court that a decree under O. XXXIV, r. 4 be prepared in any way upset.

The decree-holder is now seeking to recover the amount decreed to him by sale of the pension in the hands of *Musammat* Biggha Begam. The learned Subordinate Judge has held that this pension is not attachable, and, therefore, cannot be sold. He has, therefore, dismissed the decree-holder's application.

In our opinion the question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. If the point was expressly raised by the defendant concerned in the suit itself and decided against her and a decree under O. XXXIV, r. 4 was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the Execution Court to re-open the question which has already been decided in the original suit. Of course, if the question had not been decided at all and the Execution Court were called upon for the first time to consider whether it would proceed to sell the property which either on the face of it or admittedly was not saleable there might be some force in the contention that the Court would not be justified in selling it. But the case here is quite different and we think that the question which depended on a consideration of a number of facts should not now be allowed to be re-opened. We may note that in the Full Bench case of *Mubarak Husain* v. *Ahmad* (1) two out of the three learned Judges held that in cases where no attachment is necessary and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property, s. 60 of the C. P. C. will not be applicable so as to prevent the Court from selling the property.

The learned Vakil for the respondent has drawn our attention to the judgment of a Single Judge of this Court which was afterwards affirmed in appeal under the Letters Patent in the case of *Mazhar Ali Khan* v. *Mahfuz Hasan* (2), where the learned Judge referring to the final judgment referred to above remarked at pages 698* and 699* that the question whether a particular piece of property in the hands of the defendant was "attachable" was irrelevant in the suit, which was brought to determine the liability of that defendant and he felt satisfied that the point was not decided by anybody so as to be binding upon the parties. That judgment, however, was between the decree-holder on the one hand and Mahfuz Hasan on the other, to which *Musammat* Biggha

(1) 84 Ind. Cas. 749; 46 A. 489; 22 A. L. J. 321; (1924) A. I. R. (A.) 328; L. R. 5 A. 201 Civ.

(2) 68 Ind. Cas. 854; 44 A. 697; 20 A. L. J. 679; (1922) A. I. R. (A.) 429.

*Pages of 44 A.—[*Ed.*]

Begam, the present respondent, was not a party. It is, therefore, obvious that *Musammat* Biggha Begam cannot take advantage of that judgment as if it were *res judicata*. The remarks in that judgment must be considered to be *obiter dicta* so far as the present litigation is concerned.

We have already said that a decree under O. XXXIV, r. 4 was prepared, and it is, therefore, obvious and that there has not been any question of an "attachment" of the pension, but only whether the charge was enforceable against this property.

Considering the case on the merits we are satisfied that this pension is saleable. It may be that in the case of *Muzhar Ali* v. *Mahfuz Hasan* (2), the decree-holder could not adduce sufficient evidence to satisfy the Court that the pension was saleable. In the present case, however, there is plenty of documentary evidence on the record which points to that direction. This pension is entered in the register which was prepared for entering pensions coming under s. 7 (2) of the Pensions Act (No. XXIII of 1871), which are expressly declared to be transferable. The learned Subordinate Judge says that this pension was entered wrongly in this register. There seems to be no ground, however, for suspecting that this was so. The reason given by the learned Subordinate Judge is that this pension was granted under an order of 1887, but the register itself shows that this pension was certainly of an earlier date.

In a judgment dated the 27th of May 1896 which was delivered in a suit between Khuda Bakhsh the mortgagee, and *Musammat* Alimunnisa, a representative of the mortgagor, it was expressly decided that the pension which had been previously mortgaged was transferable. That judgment shows that the pension was granted *at least* as early as 1866. This judgment was affirmed on appeal on the 26th of August 1901. Subsequently there was another litigation between Khuda Bakhsh on the one hand and Alimunnisa on the other in which on the 10th of October 1906 there was a similar finding. The predecessors-in-title of the parties were parties to those suits and, therefore, even if those judgments do not operate as *res judicata* they are certainly admissible in evidence.

There is the further fact that these pensions have been transferred from one person to another. *Musammat* Biggha Begam, the objector, is herself a transferee of the portion in her hands, and so is the decree-holder, Mazhar Ali. There are also other transferees of this pension.

Having regard to all these circumstances we are convinced that this pension was not a political pension which is declared to be non-transferable under s. 11 of the Pensions Act.

The result, therefore, is that this appeal is allowed the decree of the Court below set aside, and the objection of *Musammat* Biggha Begam dismissed with costs.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 561 OF 1923.

January 21, 1924.

Present :—Mr. Justice LeRossignol.

GANPAT RAI—PLAINTIFF—PETITIONER

versus

Musammat NIHAL DEVI—DEFENDANT—RESPONDENT.

Account, suit for balance of—Acknowledgment of liability—Suit, whether maintainable.

Plaintiff sued the defendant, a widow, as the representative of her deceased husband and in his plaint recited that he had transactions for many years with the husband of the defendant and that after the death of the original debtor, his widow, after consideration of the account, struck a balance acknowledging her liability for the debt, but had hitherto failed to liquidate it. In support of the plaint the plaintiff produced his accounts :

Held, that the suit was based upon the account which the plaintiff had with the defendant's husband and was not based merely upon the acknowledgment of the latter and was consequently maintainable.

Petition, under s. 44 of Act VI of 1920 and s. 115, C. P. C., for revision of a decree of the Senior Subordinate Judge, First Class, Sheikhupura, dated the 7th May 1923.

Mr. *K. J. Rustomji*, for the Petitioner.

Lala *Durga Das*, for the Respondent.

JUDGMENT.—The plaintiff sued the defendant, a widow, as the representative of her deceased husband, and in his plaint recited that he had transactions for many years with the husband of the defendant, that after the death of the original debtor the widow after consideration of the account struck a balance acknowledging her liability for the debt, but had hitherto failed to liquidate it. The Trial Court dismissed the suit on two grounds :

1. That the suit was based upon the acknowledgment of debt which contained no promise to pay and was, therefore, not maintainable, and 2 that, as a matter of fact, the acknowledgment of the debt was not thumb marked by the defendant.

On appeal the learned Senior Subordinate Judge did not deal with the question of fact but dismissed the appeal solely on the ground that the suit being based on a mere acknowledgment was not maintainable. The plaintiff has come to this Court in revision and, in my opinion, deserves to succeed. The plaint clearly recites that the suit is brought on the strength of many years' dealings between the plaintiff and the defendant's deceased husband and on an acknowledgment of the debt by the defendant as representative of her deceased husband. Moreover the plaintiff produced his accounts in support of his prayer. For these reasons the case is readily distinguishable from that reported as *Pala Mal* v. *Tula Ram* (1).

I accept the petition, set aside the decree of the Court below and remand the case to it for decision on the merits. The costs of this hearing shall follow the final event of the case.

Z. K. *Petition accepted: Case remanded.*

(1) 119 P. R. 1908; 206 P. W. R. 1908.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 113 OF 1924.

February 26, 1925.

Present:—Mr. Baker, J. C.

SHEORAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

SOMA—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 28—Sale-deed—Property not belonging to vendor, included in sale-deed—Fraud—Registration, validity of—Finding of fraud, based on inferences from conduct, legality of.

An intentional inclusion by a vendor of property not belonging to him in the sale-deed, in order to give jurisdiction to a particular Registering Officer to register the deed amounts to fraud and vitiates the registration of the document so as to render it inoperative and ineffective to confer a title on the vendee. [p. 368, col. 2.]

Harendra Lal Roy Chowdhury v. *Hari Dasi Debi*, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.), *Mangali Lal* v. *Abidyar Khan*, 41 Ind. Cas. 3; 39 A. 523; 15 A. L. J. 550, *Ram Lal* v. *Tamkin Bano*, 49 Ind. Cas. 543; 41 A. 385; 17 A. L. J. 363 *Urkudya* v. *Doma*, 50 Ind. Cas. 764; 15 N. L. R. 75, *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*, 5 B 143; 3 Ind. Dec. (N. S.) 96, *Karala Nanubhai* v. *Mansukhram*, 24 B. 400; 2 Bom. L. R. 220; 12 Ind. Dec. (N. S.) 799 and *Ram Baksh* v. *Mughlani Khanam*, 26 A. 266; A. W. N. (1904) 8, followed.

Ganesh Ramchandra Kulkarni v. *Laxmibai Venkatesh Narayan*, 67 Ind. Cas. 209; 46 B. 726 at p. 732; 24 Bom. L. R. 249; (1922) A. I. R. (B.) 96, *Lalman Pande* v. *Sheo Narain Pande*, 51 Ind. Cas. 865; 17 A. L. J. 737; 1 U. P. L. R. (A.) 124, *Gajendra Nath Dey* v. *Ashraf Hossain*, 69 Ind. Cas. 707; 27 C. W. N. 159; 36 C. L. J. 48; (1923) A. I. R. (C.) 130, *Pahladi Lal* v. *Laraiti*, 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871 and *Kunhi Sankaran Nambiar* v. *Narayanan Thirumumou*, 55 Ind. Cas. 86; 43 M. 405; (1920) M. W. N 205; 11 L. W. 192; 38 M. L. J. 251, distinguished.

A finding of fraud based on inferences drawn from the conduct of the parties in the absence of direct evidence is not illegal, as it is not ordinarily possible to prove fraud by direct evidence. [p. 369, col. 1.]

Appeal against the decree of the District Judge, Bhandara, dated the 8th December 1923, in Civil Appeal No. 59 of 1923.

Mr. *M. R. Bobde*, for the Appellants.

Messrs. *M. Gupta* and *S. C. Dutt Chowdhry*, for the Respondent.

JUDGMENT.—The facts of this case are simple, although they raise several points of law. The plaintiff, Doma, obtained a decree in the Court of the Munsif, Sakoli, against Vithoba and Bhiwa. On the 28th of June 1922 the lands in dispute were ordered to be attached. On the 27th of June the judgment-debtors sold the lands to the defendants along with a house situated in an adjoining village in the Chanda District, the lands in dispute being situated in the the Bhandara District. On the 28th the lands were attached and on the 29th the sale-deed was registered. The vendees objected to the attachment, which was raised, and the plaintiff then brought a suit under O. XXI, r. 63, C. P. C., for a declaration that the lands were liable to be attached.

The First Court dismissed the suit, holding that the sale-deed was a genuine one and not executed in fraud of creditors and that it was validly registered at Brahmapuri.

On appeal the District Judge, Bhandara, reversed the decree, holding that the vendors did not possess any house at Naneri in the Chanda District and that the house described in the sale-deed did not belong to the vendors, and, therefore, the property being situated in the Sakoli Taluka in the Bhandara District and there being no pro-

perty in the Chanda District, the registration was invalid and fraudulent and the sale-deed conferred no title. He also held that the vendees could know and did know that the vendors had no house at Naneri and the fact that the sale-deed was executed the day before the attachment and registered the day after it, indicated that the vendees were not acting in good faith and were also a party to the fraud along with the vendors.

The sole question, therefore, in this appeal is whether this sale is fraudulent and conveys no title to the vendees. The learned District Judge has not gone at all into the question of consideration for the sale-deed. He has rested his judgment on the fact that the registration took place in a district in which no part of the property was situated and, therefore, conveyed no title to the vendees and that there was a fraud.

In spite of the arguments of the learned Pleader for the appellants I am of opinion that the finding that the vendors possessed no property in the Bhandara District, that is to say, that the house in *Mouza* Naneri did not belong to them, is a finding of fact based on the evidence, behind which this Court cannot go in second appeal. The District Judge has considered the evidence on this point on both sides and has recorded a definite finding on it, and this question cannot be re-opened.

It has, however, been contended at some length that assuming that the sale-deed conveys no title, it can be treated as an agreement to sell and that from the date it was passed the judgment-debtors became only the trustees for the defendants and had no interest in the property. Even if the deed be regarded as unregistered, the judgment-debtors having sold the property to the appellants could not have sold it to any body alse and the same result cannot indirectly be achieved by the attaching creditor.

The lower Appellate Court has recorded no finding on the question of consideration, and, therefore, the finding of the First Court, which was that consideration was paid must prevail.

It is also argued that there is nothing on the record to justify the finding that the sale-deed was a fraud.

The learned Pleader for the appellants has relied on the following cases :—

Burjorji Cursetji Panthaki v. *Muncherji Kuverji* (1), *Karala Nanubhai* v. *Mansukhram* (2), *Ram Baksh* v. *Mughlani Khanam* (3), *Ganesh Ramchandra Kulkarni* v. *Laxmibai Venkatesh Narayan* (4), *Lalman Pande* v. *Shoe Narain Pande* (5) and *Gajendra Nath Dey* v. *Ashraf Hossain* (6) as showing that even if there is no completed contract of sale, the vendor has no interest in the property. These are all cases where there was no fraud.

It is also argued that the mere inclusion of property not belonging to the vendors will not invalidate the registration and reférence is made to *Pahladi Lal* v. *Laraiti* (7) and *Kunhi Sankaran Nambiar* v. *Narayanan Thirumumou* (8).

It is to be observed that in the latter cases it was held that there was no fraud.

In the present case the District Judge has held that there was fraud for the following reasons. The vendors and vendees reside in the same village Teli in the Sakoli Tahsil of the Bhandara District, where also the lands sold are situate. The village of Naneri in Chanda District is separated only by a river from that village. The vendees had no lands in Naneri and it has been found that they had no house there.

The order for attachment was issued on 26th June, the sale took place on 27th June, the attachment was effected on 28th June, and the registration took place at Brahmapuri on 29th June. It is also in evidence that the *malguzar* of Naneri is father-in-law of one of the vendors. He must have known that the house did not belong to the vendors.

On this the District Judge found that the vendees were aware of the fact that the house did not belong to their vendors. Hence the entry must be intentional. On this finding the inference of fraud arises as held by the Privy Council in *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (9),

(1) 5 B. 143; 3 Ind. Dec. (N. S.) 96.
(2) 24 B. 400; 2 Bom. L. R. 220; 12 Ind. Dec. (N. S.) 799.
(3) 26 A. 266; A. W. N. (1904) 8.
(4) 67 Ind. Cas. 209; 46 B. 726 at p. 732; 24 Bom. L. R. 249; (1922) A. I. R. (B.) 96.
(5) 51 Ind. Cas. 865; 17 A. L. J. 737; 1 U. P. L. R. (A.) 124.
(6) 69 Ind. Cas. 707; 27 C. W. N. 159; 36 C. L. J. 48; (1923) A. I. R. (C.) 130.
(7) 48 Ind. Cas. 200; 41 A. 22; 16 A. L. J. 871.
(8) 55 Ind. Cas. 86; 43 M. 405; (1920) M. W. N. 205; 11 L. W. 192; 38 M. L. J. 251.
(9) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; 12 A. L. J. 774; 16 M. L. T. 6; (1914) M. W. N. 462; 1 L. W. 1050; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 41 I. A. 110 (P. C.).

also *Mangali Lal* v. *Abidyar Khan* (10) and *Ram Lal* v. *Tamkin Bano* (11). The same view has been taken by this Court in *Urkudya* v. *Doma* (12).

It is argued that there is no evidence on which a finding of fraud can be based. It is not, however, possible for the plaintiff to prove fraud by direct evidence. It has to be inferred from the conduct of the parties.

It is argued by the learned Counsel for respondent that the plaintiff had gone to Sakoli on the 26th to get the warrant of attachment issued and that the registration was effected at Brahmapuri because the judgment-debtors were afraid to go to Sakoli which is the place where registration should have been effected.

It is a fair inference that the deed was registered at Brahmapuri because the plaintiff was less likely to know about it as he is a resident of Bhandara District.

I do not see any reason for interference and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(10) 41 Ind. Cas. 3; 39 A. 523; 15 A. L. J. 550.
(11) 49 Ind. Cas. 543; 41 A. 385; 17 A. L. J. 363.
(12) 50 Ind. Cas. 764; 15 N L. R. 75.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 4 OF 1924.
March 26, 1925.
Present:—Mr. Daniels, J. C.

THE SPECIAL MANAGER COURT OF WARDS, BALRAMPUR—PLAINTIFF—APPELLANT
versus
RAM PARGAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 140—Occupancy tenancy—Nankar, *deduction in respect of—Suit for rent—Deduction, whether can be claimed.*

A decree by which a right of occupancy was conferred on the defendants provided that the rent was to be calculated at cultivators' rate less a certain amount for *nankar*. In a suit by the landlord to recover the amount of the rent the defendants claimed to deduct the amount of the *nankar* from the rent:

Held, that under the decree which conferred occupancy rights on the defendants the real rent was what remained after deducting the *nankar* payable, and that the defendants' plea was not, therefore, in the nature of a set-off and was not repugnant to the provisions of s. 140 of the Oudh Rent Act.

Bhagwati Prasad Singh v. *Ram Jiwan*, 21 Ind. Cas. 201; 17 O. C. 6, followed.

Deputy Commissioner, Gonda v. *Bhagwan*, 2 Ind. Cas. 297; 12 O. C. 124, distinguished.

Second appeal under s. 119-B, Oudh Rent Act, against the decree of the District Judge, Gonda, dated the 25th September 1924, reversing that of the Assistant Collector, First Class, Gonda, dated the 29th January 1923.

Rai *Nagendra Nath Ghoshal Bahadur*, for the Appellant.

JUDGMENT.—The defendants are occupancy tenants who are entitled to a deduction of Rs. 37-8-0 from their rent by way of *nankar*. The only plea pressed in this appeal is that this deduction could not be claimed in an arrears of rent suit by reason of s. 140 of the Oudh Rent Act, the claim being by way of set-off. The Court below has rejected this plea and its decision is correct. The decree by which the right of occupancy was conferred shows that the defendants' rent was to be calculated at cultivators' rates less Rs. 75 *nankar*. The real rent, therefore, is what remains after deducting the *nankar* payable, and it is not a case of a separate amount being claimed as set-off. The case is governed by the decision in *Bhagwati Prasad Singh* v. *Ram Jiwan* (1) and not by the decision in *Deputy Commissioner, Gonda* v. *Bhagwan* (2). I dismiss the appeal.

Z. K. *Appeal dismissed.*

(1) 21 Ind. Cas. 201; 17 O. C. 6.
(2) 2 Ind. Cas. 297; 12 O. C. 124.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 132 OF 1924.
May 7, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

PIRTHI NATH AND ANOTHER—AUCTION-PURCHASERS—APPELLANTS
versus
Musammat KUNJI KOER AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Mortgage decree—Subsequent decree of another mortgagee declaring scope of prior decree—Sale in execution of prior decree—Amendment of subsequent decree, effect of—Sale, whether can be set aside.

Where a sale takes place in execution of a decree the scope of which has to be determined with reference to the terms of another decree, the sale cannot be set aside as against a *bona fide* purchaser on the ground that the latter decree, the terms of which determine the scope of the decree to be

executed, has since the date of the sale been amended so as to restrict the operation of the former decree in such a manner as to exempt the property which has been sold from the operation of that decree.

First appeal from an order of the Subordinate Judge, Balandshahr, dated the 28th May 1924.

Mr. *Panna Lal*, for the Appellants.

Messrs. *Nehal Chand* and *S. N. Gupta*, for the Respondents.

JUDGMENT.—This is an appeal against an order setting aside a sale. The appellants are the decree-holders. The decree under execution was obtained by Seth Prem Narain on the basis of a mortgage on 13th March 1918. The respondent *Musammat* Kunji Kunwar had a mortgage on certain of the properties in suit. It was provided in the decree that those properties in which she was interested should be sold after the remaining properties. No detail of the properties referred to was given in the decree. *Musammat* Kunji Kunwar had, however, brought a suit on the basis of her own mortgage, and shortly afterwards, namely, on 29th May 1918, she obtained a decree. That decree was in respect of five properties, and the two properties now in dispute, namely, Shamspur and Karimpur *alias* Dhakur, were not included in it. There was an appeal to the High Court, but in the appellate decree the same properties were specified. On 19th May 1922, after the decision of the appeal, Prem Narain applied for execution of his decree. On 21st February 1923 the sale was actually held. *Musammat* Kunji Kunwar had been given notice of the sale proceedings and did not appear or take any objection to the order in which the properties were sold. At that sale the properties now in dispute were sold along with the properties in which *Musammat* Kunji Kunwar was not interested, and the sale was not postponed until all those properties had been sold. This is the ground of *Musammat* Kunji Kunwar's objection which has been accepted by the Court below. A week after the sale the objections to the sale were made by *Musammat* Kunji Kunwar alleging that the properties had been sold contrary to the terms of the decree. Sometime between this date and 14th April 1923 she applied for amendment of the decree in the High Court. On the date just mentioned she put in an application to the Execution Court saying that she had applied for amendment of the decree and asking that the decision of her objections be postponed. The exact date of the amendment of the decree is not before us, but on 27th May 1924 *Musammat* Kunji Kunwar filed a copy of the amended decree in which the two properties now in dispute were included.

The learned Subordinate Judge has allowed the objection on the ground that the sale was contrary to the terms of the decree, but has not considered the effect of the sale having been held in accordance with the terms of *Musammat* Kunji Kunwar's decree as it stood on the date when the sale was held. The respondent's learned Counsel has urged that there is nothing to show that the Execution Court in arranging the order of the sales had that decree before it, but we think that we are justified in inferring this. It is certainly a very striking coincidence that just the properties which were omitted from *Musammat* Kunji Kunwar's decree should have been treated as properties in which she had no interest. The appellants' learned Pleader relies on the decision of the Privy Council in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) which was followed by this Court in *Pearey Lal* v. *Hanifunnissa Bibi* (2). Their Lordships laid down in this case that when a sale takes place in execution of a decree in force at the time it cannot be set aside against a *bona fide* purchaser on the ground that the decree has subsequently been reversed in appeal. The respondents' learned Counsel concedes that, if it had been Prem Narain's decree which had been subsequently amended, the principle of the Privy Council ruling would have applied. He contends that because it was another decree, namely, *Musammat* Kunji Kunwar's decree, which was amended, the case is distinguishable, and the sale has rightly been set aside. In our opinion, the same principle applies in both cases. The Execution Court was justified in interpreting Prem Narain's decree, in which no specification of the properties was given, in the light of *Musammat* Kunji Kunwar's decree which specified the properties on which she had a charge. Indeed, that decree was the best authority there could possibly be for the purpose of determining what those properties were at that time. The appellants in this case are *bona fide* purchasers who were not parties to the proceedings. We think, therefore, that they are entitled to the

(1) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(2) 34 Ind. Cas. 303; 38 A. 240; 14 A. L. J. 302.

benefit of their purchase, and that the Court was wrong in setting it aside. The sale was in accordance with the decree as it stood in the light of the decree obtained by *Musammat* Kunji Kunwar herself, and, therefore, the validity of the sale is not done away with by the fact that that decree was afterwards amended.

We accordingly allow the appeal, dismiss *Musammat* Kunji Kunwar's objections in regard to these two villages, namely, the villages of Shamspur and Karimpur *alias* Dhakur, and confirm the sale in respect of them.

The appellants will get their costs both in this Court and in the Court below. Costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 301 OF 1924.

April 29, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

BENI—PLAINTIFF—APPLICANT

versus

BISAN DAYAL AND ANOTHER—DEFENDANTS NON-APPLICANTS.

Evidence Act (I of 1872), s. 34—Account books, entries in, value of—Independent evidence, whether necessary—Set-off—Limitation.

Under s. 34 of the Evidence Act mere entries in books of account are not by themselves sufficient to charge any person with liability. The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate. [p. 372, cols. 1 & 2.]

A claim for a set-off made by a defendant not by way of defence to the plaintiff's suit but as a counter-claim cannot be allowed unless it was within time on the date on which it was made, as if the defendant had filed a suit in respect of the same on the date on which he made the counter-claim. [p. 373, col. 1.]

Revision against a decree of the Small Cause Court, Khandwa, dated the 20th August 1924, in Civil Suit No. 834 of 1924.

Mr. *W. R. Puranik*, for the Applicant.

Mr. *M. B. Niyogi*, for the Non-Applicants.

ORDER.—Defendant No. 2 was given a license to carry on the liquor shop at Kharkala Tahsil Harsud for the year 1920-21. Under the terms of the license, he had to pay Rs. 108 per month to Government as license fee and defendant No. 1 stood as his surety for punctual payment of this sum. As defendant No. 2 failed to make punctual payments, defendant No. 1 moved the Government to remove defendant No. 2 and to permit him to carry on the liquor shop for the remaining term of the license and the Government did accordingly. However as plaintiff was related to defendant No. 2 it was agreed between the parties that defendant No. 1 should permit defendant No. 2 to carry on the liquor shop and that plaintiff should be responsible for payment of Government demand if defendant No. 2 failed to pay it in time. It was further agreed between the parties that if plaintiff paid the Government demand, defendant No. 1 should recover it from defendant No. 2 and pay it to the plaintiff. Plaintiff alleged that he paid the *kist* for January 1921, *viz*, Rs. 108 on 24th January 1921 and he brought a suit for recovery of this sum together with interest thereon at Rs. 2 per cent. per mensem from both the defendants on the allegation that although defendant No. 1 recovered that *kist* from defendant No. 2 he failed to pay the same to him (plaintiff).

Defendant No. 1 admitted that plaintiff paid the *kist* of January 1921 but pleaded that the money so paid by plaintiff was not plaintiff's money but his own money. He also alleged having paid the *kists* of February and March 1921 and he claimed from the plaintiff the money paid by him for the *kists* of January, February and March 1921 after giving him deduction for Rs. 55-9-6 on account of certain articles received from him.

Plaintiff alleged in reply that he had paid the *kist* for January 1921 out of his own pocket. He denied that the money so paid by him was defendant No. 1's money. He admitted that defendant No. 1 had paid the *kists* for February and March 1921 but denied his liability to pay the same on the ground that defendant No. 1 forcibly took possession of the liquor shop from defendant No. 2 and did not allow the latter to carry on the shop. He also brought a separate suit against defendant No. 1 for Rs. 65-4-0 on account of the price of certain articles taken from him by defendant No. 1 plus interest thereon at Rs. 2 per cent. per mensem (Suit No. 1286 of 1924 in the Court of Small Causes, Khandwa, decided on 9th September 1924).

The Small Cause Court held that defendant No. 1 and not the plaintiff had paid the *kist* for January 1921. Accordingly it dismissed plaintiff's claim and gave defendant No. 1 a decree for Rs. 335-14-0 against the plaintiff after allowing the latter deduction for the price of articles taken by the former from the latter and dismissed plaintiff's Suit No. 1286 of 1924 as well. Plaintiff has now come up in revision.

It is urged on behalf of the plaintiff that the Small Cause Court was wrong in holding that defendant No. 1 had proved that the money paid for the January *kist* of 1921 was his money. In my opinion, this contention is sound and must prevail. The *kist* for January 1921 was admittedly paid into the Government treasury by the plaintiff and the Treasury Officer passed a receipt for the same in his favour and he has filed it in Court (Ex. P-1). Under these circumstances the onus lay heavily on defendant No. 1 to prove that it was his (defendant No. 1's) money which plaintiff paid into the treasury. In order to discharge this onus defendant No. 1 examined himself and filed a copy of an entry in his account-books. His evidence does not prove that he or some body else on his behalf handed over Rs. 108 to plaintiff for payment of the *kist* of January 1921 into the treasury. He deposes as follows:—

"The sum of Rs. 109-1-0, (*i. e.*, Rs. 108 for *kist* Re. 1 for warrant and 1-anna on account of writing fee for the treasury *challan*) was paid by my agent to plaintiff and *not by me.* I had instructed him to do so. *I cannot say whether I was present when he paid the money.*"

In other words, he is not prepared to swear that the sum of Rs. 109-1-0 was paid by his agent to the plaintiff in his presence. He has not examined his agent to prove payment of money to the plaintiff. He has no doubt filed a copy of the entry in his books of accounts in regard to payment of this sum to the plaintiff. But the entry is not in his handwriting and he has no personal knowledge of the transaction to which the entry relates. In other words the entry has not been proved. Mere entries in books of account are not by themselves sufficient to charge any person with liability (*vide* s. 34 of the Evidence Act). The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate and as no such evidence has been adduced in this case the Court below was wrong in holding that defendant No. 1 had paid money to plaintiff for payment of the *kist* for January 1921. Plaintiff's claim for that *kist* should have been decreed against defendant No. 1 as it is admitted that he had realised the amount due for that *kist* from defendant No. 2 and was liable under an agreement between the parties to pay that amount to the plaintiff.

It is contended that the fact that defendant No. 2 paid the January *kist* to defendant No. 1 shows that defendant No. 1 must have paid money for payment of that *kist* into the treasury to the plaintiff. This inference is wholly fallacious. Defendant No. 1 may have falsely represented to defendant No. 2 that he had paid the *kist* for January 1921 and may have thus recovered the amount of that *kist* from defendant No. 2. The Court below was clearly wrong in acting on such an inference only when it had no independent proof of payment before it.

It is next urged on behalf of the plaintiff that the lower Court should have dismissed defendant No. 1's claim for the *kist* of February 1921 as it was barred by time on the date on which he filed his written statement claiming that sum. I think this contention is sound and must prevail. The case of *Pragi Lal* v. *Maxwell* (1) on which reliance has been placed on behalf of defendant No. 1 was a case of an equitable set-off and is clearly distinguishable from the present case. In this case it must be remembered that defendant No. 1 claimed set-off not merely as a ground of defence. His defence that he and not the plaintiff had really paid the January *kist* was, if proved, a sufficient defence to defeat plaintiff's claim. But instead of resting satisfied with this defence, he counter-claimed for the *kists* of January, February and March 1921. Even if the claim for January *kist* be treated as a defence in the alternative, that for the February and March *kists* can in no sense be treated as a defence and limitation in regard to the recovery of the

(1) 7 A. 284; A. W. N. (1885) 40; 4 Ind. Dec. (N. S.) 543

latter two *kists* must be determined by reference to the date on which defendant No. 1 preferred his counter-claim and not the date on which plaintiff instituted his suit. According to this view, his claim for recovery of the February *kist* which he paid on 21st February 1921 and for which he preferred his claim on 18th March 1924 must stand dismissed. His claim for recovery of the January *kist* fails because I have held that plaintiff and not he (defendant No. 1) paid that *kist*. The claim for recovery of the March *kist* which was paid by defendant No. 1 on 31st March 1921 is within time and must be allowed.

The amount due to plaintiff for the January *kist* of 1921 plus interest thereon at Rs. 2 per cent. per mensem comes to Rs. 185-12-0 and that due to defendant No. 1 for the March *kist* of 1921 plus interest thereon at Rs. 2 per cent. per mensem comes to Rs. 185-13-8. Defendant No. 1 is therefore, entitled to a decree for 1 anna 8 pies only against the plaintiff. The decree of the lower Court is, therefore, modified by substituting 1 anna 8 pies for the sum decreed by that Court in favour of defendant No. 1. Parties will share costs of both Courts in proportion to their success.

Plaintiff's claim in Suit No. 1286 of 1923 has not been disputed before me by defendant No. 1. The decree of the Court below in that suit is reversed and it is hereby decreed that defendant No. 1 do pay Rs. 88-12-0 to the plaintiff and bear costs of both Courts.

Z. K. *Decree reversed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES No. 2440 OF 1922, NOS. 878 AND 879 OF 1923.

April 9, 1925.

Present:—Justice Sir Ewart Greaves KT., and Mr. Justice Cuming.

HUSENA BANOO AND OTHERS—DEFENDANTS—APPELLANTS

versus

Hon'ble BROJENDRA KISHORE ROY CHOUDHURY—PLAINTIFF—RESPONDENT.

Muhammadan Law—Guardianship—Mother, whether guardian—Contract by mother on behalf of minor son, whether binding on minor—Kabuliyat *executed by mother—Minor, whether liable for rent.*

Under the Muhammadan Law the mother is not the legal guardian of her minor sons and cannot, therefore, contract on behalf of the latter so as to bind them. [p. 374, col. 1.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), followed.

A Muhammadan minor cannot be sued for rent on the basis of a *kabuliyat* executed by his mother on his behalf. [p. 374, col. 2]

Appeals against the decrees of the District Judge, Mymensingh, dated the 16th of June 1922, affirming those of the Additional Munsif, Netrokona, dated the 30th of July 1921.

Babus *Brajalal Chakravarti* and *Birendra Kumar De*, for the Appellants.

Mr. *Mohendra Nath Roy*, Babus *Ramani Mohan Chatterjee* and *Rebati Mohan Chatterjee*, for the Respondent.

JUDGMENT.

Cuming, J.—In the three suits out of which these three appeals have arisen the plaintiff sued the defendants for arrears of rent on the following facts. In a Settlement Record the three holdings for which the plaintiff now sues were shown as liable to assessment of rent. The plaintiff brought proceedings under s. 105 of the Bengal Tenancy Act against the defendants for assessment of fair and equitable rent. While these cases were pending defendants Nos. 1 and 2 executed a *kabuliyat* on their own behalf and defendant No. 1 on behalf of defendants Nos. 3, 4 and 5 in respect of the three holdings and upon this the proceedings under s. 105 were withdrawn. The plaintiff has now sued for rent for these three holdings on the basis of the *kabuliyats*. The defence was, firstly, that the *kabuliyats* were brought about by undue influence, fraud and coercion and that, therefore, they were not binding on them; and secondly, that defendant No. 1 is a *pardanashin* lady and that defendant No. 2 at the time of the execution of the *kabuliyats* was a school boy of 19 or 20 years of age and that the *kabuliyats* were not properly explained to defendant No. 1 and the third ground was that defendant No. 1 was only a *de facto* guardian of the children, defendants No. 3, 4 and 5 and that, therefore, the *kabuliyat* executed by defendant No. 1 on their behalf is not binding on them. I should note here that defendant No. 4 had died since the institution of the suit. The Trial Court found all the issues in favour of

the plaintiff and against the defendants and decreed the suit in full and this finding was confirmed on appeal in the District Court. Defendants Nos. 1, 2, 3 and 5 have now appealed to this Court.

The first point argued is that defendant No. 1 is a *pardanashin* lady and that the burden of proof lay on the plaintiff to prove that she had had independent advice and that she understood the terms of the *kabuliyat*. This is purely a question of fact which is disposed of, I think, by the finding of the lower Appellate Court. The learned Judge states 'It seems to me a safe inference from the circumstances that the advice of the defendants' Pleader in the s. 105 cases was taken regarding the *kabuliyats*.' The learned Judge seems to be satisfied that the lady had acted on independent advice.

The next point raised on behalf of the defendants has more substance. The point is that at the time of the execution of the *kabuliyats* defendants Nos. 3 and 5 admittedly were minors, that defendant No. 1 was not a legal guardian of the two minors and that she was only a *de facto* guardian and, therefore, she could not bind the two minors defendants Nos. 3 and 5 and in support of this contention he relies on the case of *Imambandi* v. *Mutsaddi* (1), a decision of the Privy Council. In dealing with this case at page 903* their Lordships laid down "under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a '*de facto* guardian' has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the infant as a trespasser." The respondents have contended that this decision only decides the powers of a *de facto* guardian so far as regards the sale or transfer of immoveable property. But I am inclined to think that the principle which underlies the ruling is that a *de facto* guardian cannot contract on behalf of a minor so as to bind him. The learned Advocate who has appeared for the respondents has further argued that the s. 105 proceedings were compromised as a result of the parties having entered into a *kabuliyat* and contends that had there been no compromise and had a fair rent been fixed in the proceedings under s. 105 and had a guardian been legally appointed they could not challenge the order made in the proceedings. Possibly, this is correct. But the facts are that no final order was passed in the proceedings, the proceedings being withdrawn on the ground that the parties had compromised. The conclusion, therefore, I must come to is that the minor defendants Nos. 3 and 5 are not bound by the terms of the *kabuliyats* and so far as they are concerned the appeals must succeed and the suits must be dismissed. So far as defendants Nos. 1 and 2 are concerned the appeals must fail and are dismissed.

We make no order as to costs in any Court.

Greaves, J.—I agree.

Z. K. *Appeals allowed.*

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

*Page of 45 C.—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 740 OF 1923.

May 15, 1925.

Present:—Mr. Justice Boys and Mr. Justice Ashworth.

KALI CHARAN SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Musammat BAGESHRA KUNWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Hindu Law—Alienation by widow—Suit by reversioner challenging alienation—Plea that plaintiff is not reversioner, not taken—Subsequent suit by sons of previous plaintiff—Plea that plaintiffs are not reversioners, whether barred—Res judicata—*Remote reversioner, whether can maintain suit—Appeal, second—Point not argued before lower Appellate Court, whether can be taken.*

Plaintiffs alleging themselves to be the presumptive reversionary heirs of one *M* brought a suit against the latter's widow and against certain transferees from the widow challenging the transfers made by the widow in favour of the latter. One of the pleas set up in defence was that the plaintiffs were not the reversioners of *M*. In a previous suit for a similar relief brought against the widow and a certain transferee from her by the father of the plaintiffs

the defendants had not raised the plea that the then plaintiff was not a reversioner of *M*. It was found on the evidence in the present suit that plaintiffs were not the reversioners of *M* :

Held, that the question whether the plaintiffs were or were not the reversioners of *M* was not *res judicata* by virtue of the failure of the defendants to raise the plea in the previous suit brought by plaintiffs' father.

Where the immediate reversioner of a deceased Hindu is a minor it is not competent to remoter reversioners to maintain a suit to challenge alienations made by the widow of the deceased. It is, however, open to them to sue as the next friends of the minor so as to obtain a decree in the minor's name.

Where an Appellate Court states in its judgment that the points discussed by it were the only points argued before it, it must be presumed that no other matter was put forward and discussed before that Court. In such a case it is not open to an appellant to argue a point in second appeal which was not argued before the lower Appellate Court.

Second appeal from a decree of the District Judge, Benares, dated the 15th of February, 1923.

Messrs. *Iqbal Ahmad* and *Haribans Sahai*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by certain persons alleging themselves to be the presumptive reversionary heirs of one Makundi Singh against the widow in possession and against certain transferees from the widow.

Amongst other points taken up in defence, it was urged that the plaintiffs-appellants were not the next reversioners. The Subordinate Judge of Jaunpur framed an issue on this pleading and decided it in favour of the defendants, namely, he held that there was a nearer reversioner one Jangbahadur, grandson of Makundi Singh. The plaintiffs, however, pleaded that the defendants were debarred from taking advantage of this plea because in a previous suit brought by their father as next reversioner against the widow and against transferees of other portions of the estate of Makundi Singh, the widow and those transferees had failed to adopt the plea now put forward that the plaintiff's father was not the next reversioner. The Subordinate Judge accepted this plea and held that the matter was *res judicata*. He consequently decreed the plaintiffs' suit.

In appeal the District Judge held that the doctrine of *res judicata* did not apply and accordingly on the finding of fact that the plaintiffs were not the next reversioners dismissed the suit.

In this appeal the first ground taken up is that the Subordinate Judge was right and the District Judge was wrong as to the question of *res judicata*. Reliance is placed on the Full Bench ruling of this Court in *Kesho Prasad Singh* v. *Shcopargash Ojha* (1), where it was held that a question decided between the widow in possession and the next reversioner for the time being would bind the reversioners suing at a later date the widow on a similar cause of action. We distinguish this ruling on the following ground. The ruling applied to a party who was, in fact, the reversioner. The present appellants wish us to apply the same reasoning to a party who is not the next reversioner, in fact, but only a claimant to be such. We, therefore, find no authority for holding that the failure of the widow or the transferees in the first case to raise the plea against the father of the present plaintiffs that he was not the next reversioner would in any way be *res judicata* as regards the present suit.

The next ground of appeal taken is that the lower Appellate Court was bound to consider whether the finding of the Subordinate Judge on the question of fact whether Jangbahadur Singh was the next reversioner was correct or not. From the lower Appellate Court's judgment we find it stated that the legal question of *res judicata* was the only one argued. From this we infer that the respondent did not in that appeal before the District Judge ask to be heard on the question of fact and we must hold that the matter did not come up before the District Judge. He was entitled, therefore, to disregard it.

The only other ground taken up in this appeal was that Jangbahadur Singh being a minor at the time of both suits could be legally represented in each by the father of the plaintiffs and the plaintiffs themselves respectively. Reliance is placed on the Privy Council ruling in *Rani Anand Kunwar* v. *Court of Wards* (2), where it was held that a person who was not the presumptive reversionary heir but a more distant heir might bring a suit on behalf of the reversioners where the presumptive reversionary heir had colluded with the widow. An attempt is made to infer from the

(1) 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A.) 301.

(2) 6 C. 764; 8 C. L. R. 381; 8 I. A. 14; 4 Shome L. R. 73; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique & Jackson's P. C. No. 63; 3 Ind. Dec. (N. S.) 495 (P. C.).

principles underlying this proposition that a more distant heir may sue where the nearest reversionary heir is a minor. Neither the ruling nor any principles invoked in that ruling appear to support such a proposition and for an obvious reason the more distant reversioners are in a position to appear and sue as the next friends of the minor and that is the method of law prescribed for enabling a minor to assert his rights. Indeed so far as we are aware there is nothing to prevent the minor suing through a next friend at this stage.

For the above reasons we dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1116 OF 1921.

November 6, 1923.

Present:—Mr. Rupchand Bilaram, A. J. C.

THE SIND TYPEWRITING CO.---
PLAINTIFFS

versus

THE KARACHI PORT TRUST AND THE BRITISH INDIA STEAM NAVIGATION CO. LTD.—
DEFENDANTS.

Karachi Port Trust Act (Bom. Act VI of 1886), s. 87—"Person", whether includes Board of Trustees—Suit against Board—Limitation—Extension of limitation—Special Act.

The word "person" in s. 87 of the Karachi Port Trust Act includes the Board of the Trustees of the Karachi Port and a suit against them must be instituted within six months of the accrual of the cause of action as against them as prescribed by that section. [p. 377, cols. 1 & 2.]

Prag Narain v. *Karachi Port Trust*, 10 Ind. Cas. 972; 4 S. L. R. 236 and *Moosaji Ahmed & Co.* v. *Karachi Port Trust*, 45 Ind. Cas. 410; 11 S. L. R. 126 followed.

Quære.—Whether the general provisions of the Limitation Act regarding extension of the period of limitation apply to the period of limitation prescribed in a special Act, such as the Karachi Port Trust Act. [p. 373, col. 2.]

Mr. *Dingomal Narainsing*, for the Plaintiffs.

Mr. *Choithram Dewanmal*, for Defendants No. 1.

Mr. *C. M. Lobo*, for Defendants No. 2.

JUDGMENT.—Five packages of piece-goods were shipped from Bombay to Karachi by the SS. Linga under a Bill of Lading dated 6th May 1920. The plaintiffs who are the transferees of the Bill of Lading obtained delivery of only four out of the five packages at Karachi on some date prior to 10th June 1920 and instituted this suit on 9th August 1921 for value of the package short delivered against the Karachi Port Trust, defendants No. 1 in the suit who under statutory powers deal with the cargo consigned to this Port, impleading the Steam Ship Company as defendants No. 2 and claimed relief in the alternative against the two sets of defendants.

Both the defendants have pleaded limitation. Dafendants No. 1 rely on s 87 of the Karachi Port Trust Act VI of 1886 which provides a period of six months for suits filed against any person for anything done or purporting to have been done in pursuance of the Act. Defendants No. 2 have relied on Arts. 30 and 31 of the Limitation Act providing a period of one year for suits instituted against a carrier for compensation for losing goods and for non-delivery of goods.

The plaintiffs' cause of action as against defendants No. 1 is based on their failure as statutory bailees to deliver the goods at the proper time. It is conceded that the proper time for delivery of the goods was in May 1920 when the packages are said to have arrived and were ready for delivery. It is further admitted that the plaintiffs obtained a delivery order from defendants No. 2 on 18th May 1920 requesting defendants No. 1 to deliver the five packages to the plaintiffs' agents and obtained delivery of four packages and that they were informed about that time that defendants No. 1 repudiated liability for the remaining package contending that it had not been landed. It is also admitted that the plaintiffs thereupon submitted their bill dated 10th June 1920 to Messrs. Mackinon Mackenzie and Co., the local agents of defendants No. 2 for the value of the package short delivered.

The plaintiffs have based their cause of action as having arisen to them not at the date when the package was not delivered to them but in April 1921 when defendants No. 2 are alleged to have finally refused to pay the value of the goods. It appears from the correspondence Ex. 6 that on receipt of the plaintiffs' bill dated 10th

June 1920 Messrs. Mackinon Mackenzie and Co., carried on correspondence with defendants No.1 requesting them to account for the missing package in view of their receipt dated 12th May 1920 but finding that defendants No. 1 would not yield, defendants No. 2 wrote a letter dated 26th February 1921 to the plaintiffs returning to them their bill of the 10th June 1920 and referred them to defendants No. 1 as the proper accounting party. Thereupon the plaintiffs made a demand on defendants No. 1 by their letter dated 2nd March 1921 with no better results. This fresh demand made on 2nd March 1921 or the subsequent repudiation by defendants No.1 on 11th March or in April 1921 cannot give a fresh cause of action to the plaintiffs.

Mr. Dingamal, Pleader, for the plaintiffs has further contended that as the present suit is against the Board it is not a suit against any person "within the meaning of s. 87 of the Act, and that this suit should, therefore, be governed by the three years' rule provided in the Limitation Act. There is no substance in this plea which is concluded by several rulings of this Court. According to the definition given in the Bombay General Clauses Act I of 1904 "a person" is said to include any company or association or body of individuals whether incorporated or not and when used in any enactment passed by the Local Legislature it is to be interpreted in that sense unless there is something repugnant in the subject or context. In *Prag Narain* v. *Karachi Port Trust* (1), Leggatt, A.J.C., held that there was nothing repugnant in the subject or context of s. 87 of the Karachi Port Trust Act so as to deprive the Board claiming the privilege of a special notice and a special period of limitation conferred by s. 87 on any person for anything done or purporting to have been done in pursuance of the Act. The same view was adopted by Crouch, A J. C. in *Ralli Brothers* v. *The Asiatic Steam Navigation Co.*, in Suit No. 412 of 1916 and by the Appellate Bench of this Court consisting of Pratt, J. C. and Crouch, A. J. C. in *Moosaji Ahmed & Co.* v. *Karachi Port Trust* (2).

The plaintiffs' claim was, therefore, barred by limitation by the end of December 1920 or at the latest on 10th January 1921 six months after the date on which the plaintiffs submitted their claim for the value of the package to Messrs. Mackinon Mackenzie and Co., Mr Dingamal had relied on the letter of defendants No. 1 dated 11th March 1921 as saving limitation. This letter contains no acknowledgment of their liability by defendants No. 1 so as to revive limitation and having been written more than six months after the accrual of the cause of action is of no effect. It is, therefore, not necessary for me to consider the question whether the general provisions of the Limitation Act providing for extending the period of limitation apply only to the period prescribed in the Schedule of the Limitation Act or to the period prescribed in any special Act like the Karachi Port Trust Act. The decision of Hayward, A. J. C. in *Moosaji Ahmed & Co.* v. *Asiatic Steam Navigation Co.* (3) on this point is opposed to the view of the Madras High Court and also opposed to the view of Sargeant, C. J. in *Guracharya* v. *President of the Belgaum Town Municipalities* (4) and with all the due respect to the learned Judge requires further consideration. The plaintiff's cause of action as against defendants No. 2 is based on their failure to carry the package to Karachi by the SS. Linga and to deliver it to defendants No. 1 for if they did actually deliver the package free of the ship's tackle their responsibility ceased under the terms of their Bill of Lading. The cause of action as against them, therefore, accrued in May 1920 when the fifth package should have been carried to and discharged at this Port. Defendants No. 2 have all along maintained that they did carry and deliver the package to defendant No. 1 in May 1920. The package ought to have been delivered to the plaintiffs in May and was not so delivered and being a suit against the carriers for compensation for non-delivery of this package the cause of action accrued due to the plaintiffs in May 1920 when the goods ought to have been delivered. Mr. Dingamal has referred me to *Jugal Kishore* v. *G. I. P. Railway* (5) and has contended that the plaintiffs' cause of action was in suspense till the 26th February 1921 when the defendants No. 2 returned the plaintiffs' bill and referred them to defendants

(1) 10 Ind. Cas. 972; 4 S. L. R. 236.
(2) 45 Ind. Cas. 410; 11 S. L. R. 126.
(3) 45 Ind. Cas. 168; 11 S. L. R. 106.
(4) 8 B. 529; 4 Ind. Dec. (N. S.) 727.
(5) 68 Ind. Cas. 981: 45 A. 43; 20 A. L. J. 792; 4 U. P. L. R. (A.) 219; (1923) A. I. R. (A.) 22.

No. 1 and that the date when the package ought to have been delivered should, therefore, be the date when the defendants No. 2 wrote the letter and has further relied on this letter as an acknowledgment saving limitation. The ruling referred to by him does not support his contention. In the present case the defendants No. 2 did not for a moment admit that the package had not been delivered by them to defendants No. 1 on 12th May 1920 or that they were making inquiries at the Port of landing to see if the package had not been shipped. On the contrary they asserted that defendants No. 1 having received the package and signed for it should make good the loss. The letter of 26th February 1921 contains no acknowledgment whatsoever. It is a repudiation of their liability and as such cannot extend the time for the institution of this suit. The plaintiffs' claim as against these defendants is also barred by limitation and must fail.

I must, therefore, dismiss the suit as barred by limitation. With regard to the question of costs I think it is a fit case in which I should order defendants No. 2 to bear their own costs. The plaintiffs submitted to them their bill for the value of missing package on the 10th June 1920 and it was not till 26th February 1921 that defendants No. 2 returned this bill to the plaintiffs and asked them to submit their claim to defendants No. 1. Even if the plaintiffs had been diligent and had filed their suit immediately thereafter their claim against defendants No. 1 would have been barred by limitation. I do not see any reason for not allowing the costs to defendants No. 1. I, therefore, order that plaintiffs do bear the costs of defendants No. 1 and that defendants No. 2 do bear their own costs.

P. B. A. *Suit dismissed.*
Z. K.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2681 OF 1920.
June 10, 1924.

Present :— Mr. Justice Campbell and Mr. Justice Moti Sagar.

SAMAIL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
HAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8, O. XXII, r. 4—Appeal—Order permitting some respondents to defend on behalf of others—Death of respondent—Substitution, absence of—Abatement.

An order passed under O. I, r. 8 of the C. P. C. permitting a certain number of respondents to defend an appeal on behalf of the others will not relieve the appellant from the necessity of impleading as respondents all those persons who were parties in the Court below and had obtained a decree in their favour, and the representatives of any of those persons who die during the pendency of the appeal. Where in such a case one of the respondents, other than those who have been permitted to defend the appeal, dies and his legal representatives are not brought on the record within the prescribed period the appeal abates wholly or with respect to the interest of the deceased respondent, as the case might be.

Wali Muhammad v. *Mahlu*, 86 Ind. Cas. 592; 1 L. C. 482; 6 L. L. J. 360; 3 L. 429; (1925) A. I. R. (L.) 124, followed.

Appeal from the decree of the Subordinate Judge, First Class, Shahpur at Sargodha, dated the 11th August 1920.

Lala *Ram Chand Manchanda*, for the Appellants.

Messrs. *Nanak Chand* and *Devi Dayal*, for the Respondents.

JUDGMENT.—Mr. Nanak Chand on behalf of the respondents takes a preliminary objection that some of the respondents are dead and that appeal has abated by reason of the appellants' failure to apply for their legal representatives to be brought on the record in time. Mr. Ram Chand on behalf of the appellants argues that his clients made an application under O. I, r. 8, C. P. C. that five of the respondents might be permitted to defend the appeal on behalf of the others and that this application was granted by this Court. It is pointed out that none of these five respondents has died and that in these circumstances it was not necessary for the appellants to make an application that the representatives of the other deceased respondents should be brought on the record. We are unable to accept this contention. The respondents who have died were clearly parties to the suit and to appeal in this Court, and, as recently held in the case of *Wali Muhammad* v. *Mahlu* (1), an order passed under O. I, r. 8, C. P. C. will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour, and the representatives of any of these persons who have died, and that the appeal will abate *in toto*, if no steps have been taken by the appellants to bring

(1) 86 Ind. Cas. 592; 1 L. C. 482; 6 L. L. J. 360; 5 L 429; (1925) A. I. R. (L.) 124.

the legal representatives of the latter on the record within the time prescribed by law.

The preliminary objection prevails and we hold that the appeal has abated *in toto*. The appellants will pay the costs of the respondents.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1304 OF 1923.

June 5, 1925.

Present:—Mr. Justice Sulaiman.

Musammat KUMARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ADIT MISIR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXIII, r. 1—Agra Tenancy Act (II of 1901), Sch. IV, groups A and B—Ejectment suit, withdrawal of, effect of—Subsequent suit for ejectment, whether barred—Suit for arrears of rent tried by Assistant Collector of Second Class—Subsequent suit for ejectment tried by Assistant Collector of First Class—Finding in previous suit, whether operates as res judicata.

A withdrawal of a suit for ejectment of a tenant is not a bar to the maintainability of a subsequent suit for ejectment. The right to sue for ejectment accrues from year to year and a subsequent suit for ejectment is not, therefore, based on the same cause of action as a previous suit for ejectment. [p. 379, col. 2.]

An Assistant Collector of the Second Class is not competent to try a suit for ejectment. A finding in a suit for arrears of rent tried by an Assistant Collector of the Second Class cannot, therefore, operate as *res judicata* in a subsequent suit for ejectment inasmuch as the subsequent suit could not have been tried by the Court which decided the previous suit. [*ibid.*]

Second appeal from the decree of the District Judge, Gorakhpur, dated the 4th of April 1923.

Messrs. *Harnandan Prasad* and *Janaki Prasad*, for the Appellants.

Dr. *M. Waliullah*, for the Respondent.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for ejectment in the Revenue Court. It appears that on a previous occasion the plaintiffs instituted a suit for ejectment which they withdrew without permission to institute a fresh suit. Subsequently they brought a suit for arrears of rent in the Court of an Assistant Collector, Second Class, and that suit was dismissed on he ground that the defendant-appellant was in fact a mortgagee, and not a tenant, of an agricultural holding. They then brought the present suit for ejectment of the defendant in the Court of an Assistant Collector of the First Class. The Court of first instance held that the decision in the former suit was not a bar to the present claim and decreed the suit on the merits. On appeal the learned District Judge allowed the appeal and dismissed the suit on the only ground that the present suit was barred by s. 11 of the C. P. C.

As to the previous withdrawal of the suit for ejectment, the point is quite clear, because the withdrawal of such a suit is not a bar to a subsequent suit. The right to sue for ejectment accrues from year to year, and the present suit is not brought on the same cause of action. Therefore the withdrawal is no bar.

As regards the question of *res judicata*, I am of opinion that the learned Judge has wrongly applied the analogy of cases decided under s. 199 of the Tenancy Act. He has relied on the case of *Shahzade Singh* v. *Mohammad Mehdi Ali Khan* (1) which turned on a conflict of jurisdiction between the Revenue and the Civil Courts. That point does not arise in this case at all. Here the suits were instituted in the Court of the same class, namely, the Revenue Court.

Suits for arrears of rent for an amount less than Rs. 100 fall under group (A) of the Fourth Schedule and are triable by the Assistant Collector of the Second Class. Suits for ejectment fall under group (B) and are triable exclusively by Assistant Collectors of the First Class. Assistant Collectors of the Second Class have no power to try a suit for ejectment at all. It is, therefore, obvious that the present suit is not one which the Assistant Collector of the Second Class who disposed of the previous suit was competent to try. The subject-matters are also different. In the previous suit the subject-matter was the arrears of rent claimed. In the present case the subject-matter is the holding itself from which the defendant is sought to be ejected. Furthermore, the causes of action are also different, for the arrears of rent were due on account of the period in respect of which the previous suit had been filed, whereas the cause of action for ejectment accrued afresh in 1921. Section 11 of the C. P. C., therefore, cannot apply, because the condition requiring that the First Court should be competent to try

(1) 3 Ind. Cas. 954; 6 A. L. J. 917; 32 A. 8.

the subsequent suit is not fulfilled in this case.

The analogy of cases where a conflict of jurisdiction between the Revenue and Civil Courts arises is quite different, because they are decided on the principle that when a matter within the exclusive jurisdiction of the Revenue Court has been disposed of by that Court, the question should not be re-opened over again in a Civil Court. The present case is rather analogous to a case where a suit for arrears of rent is first dismissed by a Munsif and then a suit for recovery of possession of the property filed in the Court of the Subordinate Judge is held not to be barred: *vide*, the case of *Run Bahadur Singh* v. *Lacho Koer* (2). This view of mine is supported by the case of *Sunder Lal* v. *Bhup Singh* (3).

As the appeal has been disposed of on a preliminary point, I set aside the decree of the lower Appellate Court and send the case back to that Court for disposal according to law.

Costs of this appeal will abide the event, which will include fees on the higher scale.

Z. K. *Decree set aside; Case remanded.*

(2) 11 C. 301; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).

(3) 88 Ind. Cas. 164; U. P. Revenue Cases, 1924, p. 43; (1924) A. I. R. (A.) 466; L. R. 5 A. 105 Rev.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291 OF 1924.

July 13, 1925.

Present:—Mr. Wazir Hassan, A. J. C.

HARI SADHAN MITRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Lala BECHA LAL—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 230—Contract made by agent—Personal liability of agent—Presumption.

Where a party to a contract signs himself as "agent and manager" it must be presumed that he intended to absolve himself from all personal liability under the contract and even if he is acting for an undisclosed principal he cannot be held to be personally liable under the contract. [p. 381, col. 1.]

Appeal against an order of the Judge, Small Cause Court, Lucknow, sitting as Additional Subordinate Judge, Lucknow, dated the 14th April 1924, modifying that of the Munsif, South Lucknow, dated the 24th March 1923.

Mr. *J. N. Chak*, for the Appellants.

Mr. *Mukund Behari Lal*, for the Respondent.

JUDGMENT.—This is the appeal of the representatives of the original defendant No. 2, Raj Kumar Mitra, who died during the pendency of the suit in the Court of first instance. The plaintiff-respondent asked for a decree for the return of Rs. 500 which he had paid as earnest money to Raj Kumar Mitra and also for damages for breach of contract for the sale of coal to the plaintiff. The Court of first instance gave a decree to the plaintiff as against the defendant No. 1 and dismissed the suit as against the defendant No. 2 as well as defendant No. 3. The plaintiff appealed from the decree of the Court of first instance to the Court of the Additional Subordinate Judge of Lucknow. The appeal was preferred against the representatives of the defendant No. 2 alone. The lower Appellate Court allowed the appeal and gave a decree as against the present appellants also. The question in issue was whether Raj Kumar Mitra acted as an agent of the defendant No. 1 in the matter of the contract and, if so, was his estate liable for the plaintiff's claim.

The lower Appellate Court has clearly found that Raj Kumar Mitra entered into the contract in the capacity of an agent for the first defendant but it has proceeded to hold that that fact did not exclude the personal liability of Raj Kumar Mitra. I have to determine whether the last-mentioned view is a sound one.

That the contract was entered into between the plaintiff and Raj Kumar Mitra is not disputed. It is also not disputed that the only evidence with regard to the details of the contract is contained in Ex. 1, which is a receipt admittedly signed and granted by Raj Kumar Mitra in favour of the plaintiff for the sum of Rs. 500 which the former received from the latter as earnest money in pursuance of the contract. In this receipt Raj Kumar Mitra signs himself "agent and manager." It must, therefore, be held in agreement with the lower Appellate Court that Raj Kumar Mitra entered into the contract in the capacity of an agent and not as a principal. That being so, on general principles Raj

Kumar Mitra was not personally liable under the contract. The respondent's learned Pleader, however, argues that as Raj Kumar Mitra did not disclose the name of his principal the presumption is that he contracted to be held personally liable as well. This argument is sought to be supported by the terms of s. 230 of the Indian Contract Act.

The argument as an abstract proposition may be sound but is inapplicable to the present case for the simple reason that, in my opinion, the presumption relied upon is rebutted by the circumstances of the case. It is agreed that the presumption is not conclusive and is liable to be rebutted and I hold that it has been rebutted. The use of the words 'agent' and 'manager' as part of the signature of Raj Kumar Mitra was clearly not descriptive of his individuality but of his legal status; and by the express use of those words, it must be held that Raj Kumar Mitra intended to absolve himself from all personal liability in the matter of the contract. In the recent case of *Universal Steam Navigation Company* v. *McKelvie & Company* (1), the law on the subject was thus stated by Lord Shaw:—

"But I desire to say that, in my opinion, the appending of the word 'agents' to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but, apart from that, the appending of the word 'agent' to the signature is a conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party." In my opinion, therefore, the appending of the words 'agent' and 'manager' in Ex. I was intended to indicate conclusively the rejection of any responsibility as a principal on the part of Raj Kumar Mitra.

I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in favour of the appellants in all Courts.

Z. K. *Appeal allowed.*

(1) (1923) A. C. 492; 92 L. J. K. B. 647; 129 L. T. 395; 28 Com. Cas. 353; 67 S. J. 593; 39 T. L. R. 480.

RANGOON HIGH COURT.

CIVIL REVISION No. 211 OF 1924.

January 19, 1925.

Present:—Mr. Justice Lentaigne.

M. V. A. L. VISWANATHAN CHETTYAR—APPLICANT

versus

ABDUL MAJID—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 17, 18—Civil Procedure Code (Act V of 1908), s. 55—Execution of decree—Arrest of judgment-debtor—Adjudication order, effect of—Security—Protection order, effect of—Procedure.

Where a judgment-debtor is arrested in execution of a decree and is brought before the Court and produces an adjudication order which has been passed after the date of the order directing his arrest, the Execution Court should not release the judgment-debtor without requiring him to give the security under s. 55 of the C. P. C., that he would appear when called upon in any proceeding upon the application for his arrest or upon the decree in the execution of which he was arrested. The object of this requirement is to compel the insolvent, when he has obtained an adjudication order, to be also reasonably diligent in proceeding with his insolvency in a *bona fide* manner. In the event of his failure to do so or otherwise displaying bad faith it would always be open to the Insolvency Court to grant leave for his arrest, and if the insolvent fails to appear in the Execution Court when so required it would then be open to that Court to enforce the security bond against the sureties and recover the full amount of the bond for the benefit of the decree-holder. [p. 382, col. 2.]

Where, however, the proceeding for the arrest of the judgment-debtor has been commenced subsequently to the adjudication order, the bar under s. 17 of the Presidency Towns Insolvency Act would have arisen and it would no longer be competent to the Execution Court to order the arrest of the judgment-debtor without the leave of the Insolvency Court. Likewise if the insolvent has obtained his protection order from the Insolvency Court before his arrest even in a case where the proceeding had commenced prior to the adjudication order, it would be equally illegal for the Execution Court to order his arrest or compel the execution of a security bond as regards any debt covered by such protection order. It would, however, be open to the decree-holder under s. 17 of the Presidency Towns Insolvency Act to apply to the Judge exercising the insolvency jurisdiction for leave to arrest the judgment-debtor. [p. 383, col. 2.]

Civil revision against an order of the Small Cause Court, Rangoon, in Civil Execution No. 5212 of 1924.

Mr. *Banerjee*, for the Applicant.

Mr. *S. M. Bose*, for the Respondent.

JUDGMENT.—This is an application for the revision of an order passed by the Third Judge of the Court of Small Causes, Rangoon, releasing a judgment-debtor on his producing an order adjudicating him an insolvent under the Presidency Towns Insolvency Act, 1909. The petitioner obtained a decree for Rs. 1,720 and Rs. 188-9-0

costs in the Court of Small Causes, Rangoon, against the respondent on the 18th February 1924. On the 29th February 1924 the petitioner applied to execute the decree by the arrest of the judgment-debtor, but that proceeding was infructuous and was eventually dismissed. On the 25th June 1924 the petitioner again applied to the Court to execute that decree by the arrest and detention in prison of the judgment-debtor; and an order was passed directing the issue of notice to the judgment-debtor. On the 29th July 1924 notice of that application was served on the respondent judgment-debtor requiring him to appear and show cause on the 31st July 1924. On the 31st July 1924 the respondent failed to appear and an order was passed by the Third Judge of the Court granting the application for his arrest. On the 4th August 1924 the warrant fee of Rs. 2 was deposited in the Court and the warrant was issued; but the judgment-debtor was not arrested thereunder until the 11th August 1924. On that date he was arrested and brought before the Court, and the record states that he then produced an adjudication order passed by this Court in Insolvency Case No. 179 of 1924 and dated the 2nd August 1924. On the same day the 11th August 1924 the learned Third Judge heard arguments and held that he was bound to release the judgment-debtor under the provisions of s. 17 of the Presidency Towns Insolvency Act, 1909, placing reliance on the decision in *Thakurdeen* v. *Dubay* (1), a decision reported in an unofficial report.

The present application is for the revision of that order. It is clear that the learned Third Judge has misunderstood the effect of the decision cited by him and has overlooked the fact that the decision in question expressly pointed out that *after* the adjudication order such a proceeding (for the arrest of the judgment-debtor) *cannot be commenced* against the insolvent without the leave of the Insolvency Court. A perusal of the section in question will also show that there is no provision in that section expressly prohibiting the continuance or completion of a proceeding *commenced before* the adjudication order, except in so far as it may involve an application for a remedy against the *property* of the insolvent. In the case now before me the application for the arrest of the judgment-debtor and the order for his arrest had been passed by the Court prior to the adjudication order, and it is admitted that the insolvent had not obtained any protection order up to the date of his release.

If the judgment-debtor had not produced the adjudication order and the Court had been unaware of any such order, it would have been the duty of the Court to comply with the provisions of subss. (3) and (4) of s. 55 of the C. P. C. and to give the judgment-debtor an opportunity to furnish security to the satisfaction of the Court, *firstly*, that he would within one month apply to be declared an insolvent, and, *secondly, that he would appear when called upon* in any proceeding upon the application or upon the decree in the execution of which he was arrested. When the judgment-debtor produced the adjudicating order, there was no necessity to require him to furnish security under both heads, because there was no longer any reason why he should be bound to apply to be declared an insolvent; but it is obvious that the adjudicating order did not fulfil the object contemplated by the second point on which such security would be required. Consequently, it was, in my opinion, the duty of the learned Judge to require the judgment-debtor to give security that he would appear, when called upon, in any proceeding or upon the decree in the execution of which he was arrested. A little consideration of the question will show that the object of this second requirement is to compel the insolvent, when he has obtained an adjudicating order, to be also reasonably diligent in proceeding with his insolvency in a *bona fide* manner. In the event of his failing to do so or otherwise displaying bad faith, it would always be open to the Insolvency Court to grant leave for his arrest and if the insolvent failed to appear in the Execution Court when so required, it would then be open to that Court to enforce the security bond against the sureties, etc., and recover the full amount of the bond for the benefit of the decree-holder.

The failure of the learned Judge to realize this important aspect of the question has, in effect, possibly given the judgment-debtor the opportunity of escaping a subsequent liability to arrest by a

(1) 55 Ind. Cas. 250; 12 Bur. L. T. 218.

sham insolvency proceeding if he has made his application for insolvency solely for that purpose.

I think, therefore, that the learned Judge should, instead of at once releasing the judgment-debtor, have adopted the different procedure permitted under sub-s. (3) of s 18 of the Presidency Towns Insolvency Act, 1909, read with s. 55 of the C. P. C., and given the judgment-debtor the opportunity of giving the modified security which I have indicated above. In my opinion the order which he passed deprived the decree-holder of an important advantage to which he was entitled and should be set aside, and the requirement should now be enforced unless some special reason has arisen in the interval barring that procedure or rendering it unfair. At the same time I realize the possibility that the judgment-debtor may in the interval have been diligent and obtained his protection order, and that having regard to the long interval of five months that has elapsed, there may now be a bar against an order being passed for his arrest. Consequently, whilst setting aside the above order I must refrain from passing any order for the arrest of the judgment-debtor, and my main object in passing the above order is to lay down a rule for the guidance of the lower Court in future cases.

I may here point out that the above remarks would not be applicable to this case if the proceeding for the arrest of the judgment debtor had been *commenced* subsequently to the adjudication order, because in that case the bar under s. 17 of the Presidency Towns Insolvency Act, 1909, would have arisen and it would no longer have been open to the Execution Court to order the arrest of the judgment-debtor without the leave of the insolvency Court. Likewise if the insolvent had obtained his protection order from the Insolvency Court before his arrest even in a case where the proceeding had commenced prior to the adjudication order, it would have been equally illegal for the Execution Court to order his arrest or compel the execution of such a security bond in that manner as regards any debt covered by such protection order. In either of such cases the decree-holder would have lost the opportunity of obtaining the advantage of such a security bond, but the extra diligence shown by the insolvent would, to some extent, have indicated the probability that he was *bona fide* and that it was not a case requiring such a safeguard.

I may here note that the decree-holder had an alternative means of seeking redress against the order in question. It was open to him under s. 17 of the Presidency Towns Insolvency Act, 1909, to apply to the Judge exercising the insolvency jurisdiction for the leave of the Court to arrest the judgment-debtor, and that Court might have granted such leave if the decree-holder had pointed out the mistake that had been made by the Court executing the decree and the special hardship to the decree-holder entailed by the failure to require the judgment-debtor to give the necessary security as a condition of the order of release. It is still open to the decree-holder to make such an application to the Insolvency Court ; and I think that such an application should be made by him, if he intends to seek any further redress by an application for the arrest of the judgment-debtor. The Insolvency Court will have full knowledge of the events that have happened in the insolvency proceedings during the five months which have elapsed since the adjudication order and whether it is a proper case for granting such leave and the conditions to be imposed ; and I think it is the scheme of the Insolvency Act that such control should be exercised by that Court, more especially as a fresh application for the arrest of the insolvent might appear to come within the bar under s. 17 of the Act. On obtaining such leave, it would be open to the decree-holder to make a fresh application to the Court executing his decree.

For the above reasons I set aside the order of the lower Court dated the 11th August 1924, but I do not order the re-arrest of the judgment-debtor. As the respondent is an insolvent, I do not make any order as to costs.

Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 51 OF 1925.

May 29, 1925.

Present :—Mr. Justice Sulaiman.

SHIAM LAL—PLAINTIFF—APPLICANT

versus

JOTIA—DEFENDANT—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 75—Instal-

ment bond—Entire amount payable on default—Limitation, commencement of.

Under Art. 75 of Sch. I to the Limitation Act it is open to the obligee of an instalment bond to waive the benefit of the provision to recover the entire amount of the bond in the case of a default in payment of an instalment.

An instalment bond provided that on the expiry of the term for payment of half the sum with interest and compound interest the creditor would have a right to recover it and that he could recover the entire amount after the expiry of the last term with interest and compound interest :

Held, that the right of the creditor to recover the entire amount of the bond did not accrue till after the expiry of the date fixed for the payment of the second instalment, and that limitation did not begin to run till after the expiry of that date.

Civil revision from an order of the Judge of the Court of Small Causes at Agra, dated the 17th of February 1925.

Mr. *N. P. Asthana*, for the Applicant.

JUDGMENT.—This suit has been dismissed on the ground of limitation. The learned Judge has in the first place misread the document and in the next place misapplied the law.

The document nowhere says that in case of default of payment of the first instalment the plaintiff was entitled to recover the *entire amount*. The words are that on the expiry of the term for payment of half the sum with interest and compound interest the creditor has a right to recover it. That obviously means to recover the amount of first instalment with interest.' It then goes on to say 'or to recover the entire amount after the expiry of the last, term with interest and compound interest. Obviously the right to recover the whole amount did not accrue till after the expiry of the date fixed for the second instalment.

The learned Judge apparently had in mind the cases of this Court under Art. 132 of the Limitation Act which is applicable to mortgages. The bond in suit, however, was not a mortgage-deed at all. It was an instalment bond within the meaning of Art. 75 of the Limitation Act. Under that Article it is open to the obligee to waive the benefit of the provision to recover the amount in the case of first default. He has done so and has brought his suit after a fresh default has been made. The suit is within three years of the time fixed for the second payment. It is accordingly within limitation. I may point out that that each case is to be governed by the Article applicable to it is made abundantly clear by the case of *Gaya Prasad* v. *Sher Ali* (1). The revision is accordingly allowed and the decree of the Court below set aside and the claim decreed with costs in both Courts.

Z. K. *Revision allowed.*

(1) 39 Ind. Cas. 574; 15 A. L. J. 313.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2312 OF 1923.

April 10, 1924.

Present:—Mr. Justice Martineau.

HAYAT ALI KHAN—DEFENDANT—APPELLANT

versus

ISHAR DASS—PLAINTIFF AND PARSHOTAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (2), O. XLI, r. 23, O. XLIII, r. 1 (u)—*First appeal from order returning plaint—Second appeal, whether lies.*

A second appeal is barred by s. 104 (2), C. P. C., where the first appeal was from an order returning a plaint and not from a decree.

A remand order not passed on appeal from a decree is not an order under r. 23, O. XLI, C. P. C., and, therefore, does not fall under r. 1 (*u*), O. XLIII of the Code.

Miscellaneous second appeal from an order of the District Judge, Multan, dated the 12th June 1923.

Sheikh *Niaz Ali*, for the Appellant.

Lala *Fakir Chand*, for Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—A preliminary objection is taken that a second appeal does not lie, and this is correct. The appeal to the District Judge was from an order returning the plaint and not from a decree, and s. 104 (2) of the C. P. C. bars a second appeal in such a case. The present appeal is also not one falling under O. XLIII, r. 1 (*u*), as the remand order passed by the District Judge, not being one passed on appeal from a decree, was not an order under O. XLI, r. 23.

Chhubu Mian v. *Har Charan Das* (1) is a case in point. The appeal does not lie and I dismiss it with costs.

S. D. *Appeal dismissed.*

(1) 18 Ind. Cas. 529; 119 P. R. 1911; 101 P. L. R. 1913; 48 P. W. R. 1913.

PATNA HIGH COURT.

CRIMINAL REVISION No. 147 OF 1925.

May 8, 1925.

Present:—Mr. Justice Macpherson.

NEHAL AHMAD KHAN—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 345, (2), 439—Penal Code (Act XLV of 1860), s. 417—Cheating—Compromise put in before evidence recorded—Permission to compound, whether should be given—Refusal to give permission—Revision.

A complaint under s. 417 of the Penal Code alleged that the accused had borrowed a sum of money from the complainant on the security of a hand-note by falsely representing to the complainant that the money was required for the necessity of a *khankah* and for its *sajjadanashin* and that it was being borrowed on behalf of the latter. Process was issued against the accused but before any evidence was recorded a petition of compromise was filed before the Magistrate. The Magistrate refused permission to compound the case on the ground that the offence related to a public trust. On revision:

Held, that although the pretence of the accused was that the money was required for the *khankah* or for the *sajjadanashin*, inasmuch as the hand-note which he executed made himself personally liable, the funds of the *khankah* were not in any way put in jeopardy and that having regard to the fact that the compromise was arrived at an early stage of the case before any evidence was recorded, the Magistrate should have given permission to compound the offence.

Criminal revision from an order of the Sub-Divisional Magistrate, Sasaram, dated 16th March 1925.

Messrs. *K. P. Jayaswal* and *D. N. Varma*, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application by the accused against an order of the Sub-Divisional Magistrate of Sasaram refusing to grant permission to the complainant and the accused in a criminal case pending before him under s. 417 of the Indian Penal Code, to compound the same.

On the 17th February the complainant, a former *tahsildar* under the *sajjadanashin* of the Sasaram *khankah*, lodged a complaint before the Sub-Divisional Magistrate against the petitioner who is a Circle Officer under the *sajjadanashin* setting out that the petitioner had cheated him of sums of Rs. 375 and Rs. 1,200 which he had obtained on hand-notes by stating that the money was wanted for the *sajjadanashin* who had directed him to execute the hand-notes; that in the hand-notes he stated that he took the first sum for the necessity of the *khankah* and the second sum for the *sajjadanashin*; that the *sajjadanashin* denied either having received the money or having asked the petitioner to borrow it on his behalf; that the petitioner on demand refused to re-pay the money to the lender and that the lender would never have lent the money to the petitioner who is in debt, except on the assurance that the *sajjadanashin* wanted it.

The Magistrate issued process under s. 417 for the 3rd March and when three witnesses including the *sajjadanashin* did not appear, he issued warrants for their arrest. On the 16th March a petition of compromise was filed between the complainant and the accused on which the Magistrate ordered as follows: "As the offence relates to a public trust I do not see any justification for permitting a compromise. The case will, therefore, proceed," and he re-issued warrants against the witnesses who had not appeared one of whom was the *sajjadanashin*.

The only question is whether the Magistrate exercised sound judicial discretion in refusing to let the case be compromised. His ground is that the *khankah* is a public trust. But it does not appear that the funds of the *khankah* are or ever were in jeopardy. The pretence of the petitioner was that the money was required for the *khankah* or for the *sajjadanashin*, but the hand-notes which he executed seem to make the petitioner himself personally liable. The affairs of the *khankah* appear to be in some confusion and the position as between the petitioner and the *khankah* or the *sajjadanashin* in respect of these loans generally is involved in considerable obscurity. Such matters cannot suitably be unravelled in a criminal case of this kind, especially where the evidence of the *sajjadanashin*, who appears from the order-sheet to have been already involved in some trouble as a witness, is necessary for a conviction. Having regard to these considerations and to the fact that the compromise was arrived at an early stage before the evidence was gone into, I am of opinion that the Magistrate would have exercised a wise discretion in assenting to the compromise. Accordingly his order of the 16th March refusing to permit the compromise is vacated and this Court under s. 345 (2) permits the offence to be compounded and acquits the accused. The Rule is made absolute.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 327 OF 1925.

May 27, 1925.

Present: - Mr. Simpson, A. J. C.

JAGANNATH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 303—"Verdict," what is—Disagreement among Jurors—Individual opinions of Jurors, whether can be recorded.

The "verdict" in s. 303 of the Cr. P. C. means the collective opinion of the Jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman. In cases of disagreement among the Jury the individual opinions of Jurors are not intended to be disclosed and it is improper for the Sessions Judge to record the individual opinions of the Jurors by name.

Appeal against an order of the Sessions Judge, Lucknow, dated the 7th May 1925.

JUDGMENT.—Jagannath was tried by the learned Sessions Judge of Lucknow, sitting with a Jury, and was found guilty of an offence under s. 498B-511, Indian Penal Code, and was sentenced to five years' rigorous imprisonment. He has appealed. He does not deny that he tried to pass certain notes, and I do not understand him to deny that the notes are in fact forged. What he says is that he found these notes in a coat, which he criminally misappropriated, in a passenger train. I cannot interfere with the verdict of a Jury, merely on the appellant's allegation that the facts are otherwise.

I note that the learned Sessions Judge has recorded the individual opinion of the Jurors by name. This is irregular. It was said in *Public Prosecutor* v. *Abdul Hameed* (1).

"In cases of disagreement among the Jury the individual opinions of members are never intended to be disclosed."

The procedure was described as opposed to a fundamental principle of the scheme of trial by Jury. It was pointed out that "verdict" in s. 303, Cr. P. C., means "the collective opinion of the Jury, as a body, arrived at after mutual consultation, and ascertained and announced by the foreman".

The appeal is dismissed.

Z. K. *Appeal dismissed.*

(1) 22 Ind. Cas. 981; 36 M. 585 at p. 588; 15 Cr. L. J. 197.

PATNA HIGH COURT

CRIMINAL REVISION No 83 OF 1925.

April 28, 1925.

Present:—Mr. Justice Macpherson.

TILAKDHARI SINGH—PETITIONER

versus

MISRI SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Summary enquiry—Deposition of witnesses, whether must be recorded—Dismissal of complaint—Irregularity.

The complainant lodged information with the Police that the opposite party had committed the offences of rioting, theft and grievous hurt. The Police recorded the statement of witnesses produced by the complainant in support of his information but declined to send up the case holding the occurrence to be an affray under s. 160 of the Penal Code, which is a non-cognizable offence. The complainant then made complaint in Court and the Magistrate held an enquiry under s. 202 of the Cr. P. C. Before the Magistrate the complainant's witnesses repeated what they had stated to the Police and the Magistrate did not record their statements and eventually dismissed the complaint under s. 203 of the Cr. P. C. On revision:

Held, (1) that the Cr. P. C. makes no provision with regard to the manner in which the evidence in an enquiry under s. 202 of the Code should be recorded and that although ordinarily a summary of the statements of the witnesses produced in such enquiry should be made for further reference, there was no practical difficulty in the present case inasmuch as the statements of the witnesses during the enquiry were the same as those which they had made before the Police; [p. 387, col. 1.]

(2) that the Magistrate had not been guilty of any error of law and his order was not, therefore, liable to be set aside. [*ibid.*]

Appeal from a decision of the Sessions Judge, Monghyr, dated the 21st January 1925, affirming that of the Deputy Magistrate, Monghyr, dated the 11th December 1924.

Messrs. *S. N. Sahay* and *Gopal Prasad*, for the Petitioner.

Mr. *Janak Kishore*, for the Opposite Party.

JUDGMENT.—This rule is concerned with a dismissal under s 203 of a complaint of the petitioner against the opposite party; an application against which dismissal was rejected by the Sessions Judge of Monghyr.

The petitioner had lodged an information with the Police on 12th October that the opposite party had rioted armed with deadly weapons and committed theft, grievous hurt also being caused to complainant and one Beda Singh. The occasion of the riot was alleged to be that on the previous day the petitioner had remonstrated with Misri Singh for blocking the public road by building on it and had threatened to bring

a suit against Misri Singh who counter-threatened as to what he would do on the following morning.

The Police declined to send up the case holding the occurrence to be an affray under s. 160 of the Indian Penal Code which is non-cognizable. The petitioner impugned the Police report before the Sub-Divisional Magistrate and his petition was treated as a complaint. The Magistrate directed him to summon his witnesses and the petitioner produced seven witnesses whose evidence the Magistrate heard. In his order the Magistrate pointed out that the witnesses had practically repeated the statement which they had made before the Police and which were before him, that none of them were disinterested, that the complainant had no right to interfere in connection with the alleged encroachment and had given the provocation. He added that witnesses had undoubtedly exaggerated the case very much and that it was impossible to base a conviction on such evidence as they gave.

On behalf of the petitioner it is now urged that the Magistrate did not take down the deposition of the witnesses and that his failure to do so was a material error. But in the first place, the Magistrate had before him the final report of the Police a detailed account of the statements of the witnesses before the Police and the witnesses repeated the same statement before him. We, therefore, know what the witnesses deposed and though ordinarily a summary of the statement should be made for further reference, there is no practical difficulty in the present instance.

In the second place it cannot be asserted that there has been an error of law since the Code makes no provision with regard to the manner in which the evidence in an enquiry under s. 202 should be recorded.

I am not prepared to hold that the Magistrate in this case acted unreasonably. Had the deposition of any witness deviated from the record of the previous statements which was before him, he would certainly have made a note to that effect.

The only point, therefore, is whether on the materials before him the dismissal of the complaint was unreasonable. I have carefully examined the papers in this case and the conclusion at which I have arrived is that it was not and that, as the Sessions Judge has remarked, further inquiry would not serve any useful purpose. The complainant apparently gave the provocation and owing to the factions in the village it is impossible to secure any disinterested evidence. There are serious contradictions on material points and it is very unlikely that any Court would convict upon the evidence adduced.

I consider, therefore, that no ground has been made out for interference with the dismissal of the petitioner's complaint.

The Rule is accordingly discharged.

Z. K. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 13 OF 1925.

April 3, 1925.

Present:—Mr. Daniels, J. C.

EMPEROR—PROSECUTOR

versus

NANDA SINGH AND ANOTHER—ACCUSED.

Evidence Act (I of 1872), ss. 123, 145—Jail Manual, para. 900—Report made to Inspector General of Prisons under para. 900, whether privileged—Statement of witnesses contained in report—Witnesses, whether can be asked whether they made statements—Privilege—Discretion of head of department, whether can be questioned.

A report submitted to the Inspector General of Prisons under para. 900 of the Jail Manual is an unpublished official record relating to affairs of State within the meaning of s. 123 of the Evidence Act and is, therefore, a privileged document. The privilege extends not merely to the actual text of the report but also to the statements of the witnesses which it incorporates. This does not, however, prevent the witnesses themselves being cross-examined under s. 145 of the Evidence Act as to whether they had made previous statements at variance with the evidence given by them in Court. [p. 388, col. 1.]

In the case of a document which is an unpublished official record relating to affairs of State the head of the department has absolute discretion to give or withhold permission for production of the document in evidence, and it is not open to the Court to call for the document in dispute in order to ascertain whether it falls within the description of an unpublished official record relating to affairs of State. [p. 388, cols. 1 & 2.]

Case Reported by the Sessions Judge, Fyzabad, under s. 438, Cr. P. C.

Mr. *Radha Krishna*, for the Accused.

The Government Pleader with him Mr. *Jagat Narayan*, for the Crown.

ORDER.—This is a reference by the learned Sessions Judge of Fyzabad in a case in which certain Jail Officials are charged with various offences in connection with the escape of a prisoner from the Sultanpur Jail. There had been a previous

investigation into the circumstances of the escape conducted by Pandit Sheo Karan Nath Misra, a Magistrate of the First Class, resulting in the submission of a report to the Inspector-General of Prisons under para. 900, of the Jail Manual. The accused applied for copies of the statements made in that investigation and also in a more informal enquiry by the Superintendent of the Jail The District Magistrate refused to allow these copies to be given. The applicants then applied that the original record be summoned. The District Magistrate refused to produce it and claimed privilege under ss. 123 and 124 of the Indian Evidence Act. The Trying Magistrate thereupon disallowed the application. The learned Sessions Judge is of opinion that ss. 123 and 124 of the Evidence Act do not apply and has referred the case to this Court for orders. Section 124 would not appear to apply but a report submitted to the Inspector General of Prisons under para. 900 of the Jail Manual is clearly an unpublished official record relating to affairs of State within the meaning of s. 123 of the Evidence Act, and I do not think that it is possible to draw the distinction, the learned Judge desires to draw between the actual text of the report and the statements which it incorporates. It was held by the Calcutta High Court in *Irwin* v. *Reid* (1) following the authority of Baron Pollock in *Beatson* v. *Skene*, (2) that it is not open to the Court to call for the document in dispute in order to ascertain whether it falls within the description. They say:

"It has been contended before us that the papers mentioned did not fall within this description, but it is fairly clear from the language of the section that the Court cannot be invited to discuss the nature of the document. The public officer concerned, and not the Judge, is to decide whether the evidence referred shall be given or withheld. If any other view were taken, the mischief intended to be averted would take place, as the Judge could not determine the question without ascertaining the contents of the document, and such enquiry, if it did take place, must, for obvious reasons, take place in public: *Beatson* v. *Skene*, (2) *Hennessy* v. *Wright*, (3), *Jehangir* v. *Secretary of State* (4)."

The same view was adopted by a Judge of this Court in *Lal Tribhawan Nath Singh* v. *Deputy Commissioner, Fyzabad* (5). Where the document is an unpublished official record relating to affairs of state the head of the department has absolute discretion to give or withhold permission.

It has been suggested that the main ground for refusing disclosure has been that the witnesses at an earlier stage of enquiry expressed ignorance of matters as to which they afterwards gave evidence. If that were so I think the learned District Magistrate might well waive the claim of privilege and leave it to the Court to decide whether the later or the earlier statements should be believed. As a matter of law however I hold that the Court is not entitled to question the claim of privilege raised by the District Magistrate. This will not, of course, prevent the witnesses themselves being cross-examined under s. 145 of the Evidence Act as to whether they had made previous statements at variance with the evidence given by them in Court.

Z. K. *Reference disapproved.*

(1) 63 Ind. Cas. 467; 48 C. 304 at p. 318; 25 C. W. N. 150.

(2) (1860) 5 H. & N. 838 at p. 853; 29 L. J. Ex. 430; 6 Jur. (N. S.) 780; 2 L. S. (N. S.) 378; 8 W. R. 544; 157 E. R. 1415; 120 R. R. 839.

(3) (1888) 21 Q. B. D. 509; 57 L. J. Q. B. 530; 59 L. T. 323; 53 J. P. 52.

(4) 6 Bom. L. R. 131 at p. 160.

(5) 47 Ind. Cas. 225; 5 O. L. J. 294 at p. 340.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 13 OF 1925.

April 4 1925.

Present:—Mr. Wadegaonkar, A. J. C.

DAMODAR—COMPLAINANT—APPLICANT

versus

JUJHARSINGH AND ANOTHER—ACCUSED—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 439—Acquittal—Revision by private prosecutor—Interference—Evidence, improper appreciation of, whether ground for interference—Warrant case—Charge framed—Defence not satisfactory—Procedure.

The High Court has jurisdiction under s. 439, Cr. P. C., to set aside an order of acquittal, but it will not ordinarily interfere in revision in such cases at the instance of a private prosecutor unless it considers that interference is urgently demanded in the interests of justice. [p. 389, cols. 1 & 2.]

Faujdar Thakur v. *Kasi Chowdhuri*, 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122, *Vellayanambalam* v. *Solai Servai*, 30 Ind. Cas. 152; 39 M. 505; 28 M. L. J. 692; (1915) M. W. N.

540: 16 Cr. L. J. 600, *Binda Prashad* v. *Ripusudan*, 1 Ind. Cas. 238: 5 N. L. R 4; 9 Cr. L. J. 211, and *Pahalwan Singh* v. *Sahib Singh*, 62 Ind. Cas. 869; 19 A. L. J. 382: 22 Cr. L. J. 597, followed.

Where a revision petition is based solely on the ground that the Trying Magistrate has not properly appreciated the evidence, it ought to be thrown out. The mere fact that the High Court sitting as a Court of Appeal may come to a different conclusion on facts is no ground for entertaining such an application. [p. 389, col. 2.]

Although in a warrant case a Magistrate has in the first instance thought fit to frame a charge against an accused person, it is not incumbent on him to convict the accused merely because the latter has failed to adduce satisfactory rebutting evidence. It is his duty when he proceeds to judgment to carefully consider all the evidence adduced in the case and the probabilities and surrounding circumstances, and, if at the time he comes to the conclusion that the guilt of the accused has not been satisfactorily established, he is bound to acquit him although he may have framed a charge against him in the first instance. [p. 390, col. 1.]

Revision against an order of the Second Class Magistrate, Banda, dated the 17th July 1924, in Criminal Case No. 22 of 1924.

Mr. *G. L. Subhedar*, for the Applicant.

Mr. *J. Sen*, for the Non-Applicants.

ORDER.—The petitioner filed a complaint against the non-applicants in the Court of the Second Class, Magistrate, Banda, alleging that when he went in company with a process-server to attach the property of the non-applicants in execution of his decree against them, they assaulted him and struck him with an axe. He examined four witnesses in proof of his allegations. The Trying Magistrate framed a charge under s. 323, Indian Penal Code, against both the non-applicants who pleaded not guilty to the charge and examined some witnesses. Eventually, the Magistrate came to the conclusion that no case had been made out against the non-applicants and acquitted them. Thereupon, the petitioner applied to the Sessions Judge, Saugor, to move the High Court for setting aside the order of acquittal. The Sessions Judge declined to do so but forwarded the papers to the District Magistrate, Saugor, for moving the Local Government to file an appeal against the order of acquittal if he thought fit to do so. The District Magistrate on receipt of the Sessions Judge's order refused to move in the matter on the ground that the case was of a very doubtful nature. Thereupon, the petitioner applied to this Court to revise the order of the Trying Magistrate.

It is no doubt true that the High Court has jurisdiction under s. 439, Cr. P. C., to set aside an order of acquittal but it has now become a settled practice that it will not ordinarily interfere in revision in such cases at the instance of a private prosecutor unless it considers that interference is urgently demanded in the interest of public justice: *Faujdar Thakur* v. *Kasi Chowdhuri* (1) *Vellayanambalam* v. *Solai Servai* (2), *Binda Prashad* v. *Ripusudan* (3). In *Pahelwan Singh* v. *Sahib Singh* (4) the Allahabad High Court has held that although a High Court has power under s. 439, Cr. P. C., to revise an order of acquittal yet this is a power which must be used very sparingly and it is a general and binding rule of practice that except in the most serious cases and in the event of grave miscarriage of justice, the High Court will not interfere in revision in such matters. I entirely agree with this view and hold that applications by private parties to revise orders of acquittal ought to be discouraged unless interference is urgently demanded in the interest of public justice. The purpose of the present application is simply to serve personal ends and not to secure administration of justice and I am, therefore, not prepared to entertain it.

Moreover, the sole complaint of the petitioner is that the Trying Magistrate has not properly appreciated the evidence adduced by the prosecution and has not given due consideration to what some of the defence witnesses have deposed. He does not allege that there is any illegality or serious irregularity in the procedure adopted by the Trying Magistrate resulting in a failure of justice. I am clearly of opinion that where a revision petition is based solely on the ground that the Trying Magistrate has not properly appreciated the evidence, it ought to be thrown out. The mere fact that the Hight Court sitting as a Court of Appeal may come to a different conclusion on facts is no ground for entertaining such an application.

It is urged before me that as the Trying Magistrate had framed a charge under s. 323, Indian Penal Code, against both the non-applicants, he was bound to convict them as the evidence adduced in support

(1) 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

(2) 30 Ind. Cas. 152; 39 M. 505; 28 M. L. J. 692; (1915) M. W. N. 540; 16 Cr. L. J. 600.

(3) 1 Ind. Cas. 238; 5 N. L. R. 4; 9 Cr. L. J. 211.

(4) 62 Ind. Cas. 869; 19 A. L. J. 382; 22 Cr. L. J. 597.

of the defence was unsatisfactory. A perusal of the Trying Magistrate's judgment shows that he did not believe the prosecution evidence and that was the reason why he acquitted the accused. He has considered that evidence at considerable length and has pointed out that it is full of discrepancies and unworthy of credit. It is true that he should not have framed a charge against the non-applicants if he was of opinion that no case had been satisfactorily made out by the prosecution against them. But although in a warrant case, a Magistrste has in the first instance thought fit to frame a charge against an accused person, it is not incumbent on him to convict the accused merely because the latter has failed to adduce satisfactory rebutting evidence. It is his duty when he proceeds to judgment to carefully considera all the evidence adduced in the case and the probabilities and surrounding circumstances and if at the time of giving judgment, he comes to the conclusion that the guilt of the accused has not been satisfactorily established, he is bound to acquit him although he may have framed a charge against him in the first instance.

I hold that no case has been made out for interference in revision and I accordingly reject this application.

G. R. D. *Application rejected.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 118 OF 1924.

March 28, 1924.

Present:—Mr. Justice Fforde.

MAMREZ AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 71, 394, 397—Conviction under two sections on same facts—Consecutive sentences, whether legal.

Where convictions under ss. 394 and 397, Penal Code, are based on the same set of facts, consecutive sentences are illegal.

Appeal from an order of the Magistrate, First Class, with s. 30 powers, Mianwali, dated the 15th January 1924.

Mr. *B. A. Cooper*, for the Appellants.

Mr. *Bhajan Lal*, for the Government Advocate, for the Respondent.

JUDGMENT.—Having heard all that Counsel has to say on behalf of the appellants, and having examined the evidence, I am satisfied that the decision of the Court below as to the guilt of the appellants is correct

In view, however, of the provisions of s. 71 of the Indian Penal Code, I am not satisfied that the learned Magistrate was empowered to pass consecutive sentences in respect of convictions under ss. 394 and 397. Both convictions are based on the same set of facts. It seems to me that the case falls within the third clause to s. 71 of the Indian Penal Code which reads as follows:—

"Where several acts, of which one or more than one would, by itself or themselves, constitute an offence constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tried him could award for any of such offences."

As, in my opinion, the imposition of consecutive sentences in the present case is not legal, I accept the appeal to the extent of making the sentences to run concurrently. In other respects the appeal stands dismissed.

S. D. *Sentence altered.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 326 OF 1924.

April 6, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

KALU—APPLICANT

versus

TIKARAM—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 439, 476—Prosecution for perjury—Grounds for order—Revision—Deposition of witnesses recorded in Small Cause Court—Deposition, whether must be read out—Admissibility of deposition—Civil Procedure Code (Act V of 1908), O XVIII, rr. 5, 6, O. L, r. 1 (b).

Proceedings under s. 476, Cr. P. C., for the institution of a prosecution for perjury should not be taken until the case in which the alleged false evidence was given, has been finally disposed of. [p. 391, col. 2.]

The main question which the Magistrate should consider in starting such proceedings is whether there is a reasonable probability of conviction, and his conclusion should be based on judicial grounds after a careful consideration of the evidence on record and the circumstances of the case. [p. 391, col. 1.]

The High Court has power to interfere in revision with an order under s. 476, Cr. P. C., if the Magistrate acted on fanciful grounds, so that he could not have formed a judicial opinion at all. [p. 392, col. 1.]

In the matter of the petition of Alamdar Husain, 23 A. 249; A. W. N. (1901) 59, followed.

As it is not incumbent on a Small Cause Court Judge to read over to witnesses the depositions recorded by him, owing to O. XVIII, rr. 5 to 12, C. P. C., having no application to Courts constituted under the Provincial Small Cause Courts Act, or to Courts exercising the jurisdiction of a Court of Small Causes, the depositions so recorded are admissible in evidence against those witnesses in the event of their prosecution for perjury. [p. 392, col. 2.]

Revision against an order of the District Judge, Nimar, dated the 6th September 1924, in Miscellaneous Case No. 98 of 1923.

Messrs. *M. Gupta* and *M. B. Niyogi*, for the Applicant.

Mr. *W. R. Puranik*, for the Non-Applicant.

ORDER.—Seth Pannal and others had filed a suit against Kalu Gujar in the Small Cause Court, Khandwa, for recovery of money due on a bond for Rs. 200 alleged to have been executed in their favour by Kalu. Kalu denied execution of the bond and pleaded that it was forged. Tikaram, one of the attesting witnesses to the bond, was examined as a witness in that case on behalf of Kalu. He deposed that Kalu had signed the bond in token of execution in his presence. The Small Cause Court held that the bond was forged and dismissed plaintiffs' claim on 10th April 1923.

On 11th June 1923 Kalu applied to that Court to prosecute Tikaram under s. 193 of the Indian Penal Code for having given false evidence in the suit referred to above. The Court dismissed the application for perjury on the basis of his deposition recorded by the Small Cause Court. Against this order Kalu appealed to the Court of the District Judge, Khandwa. The learned District Judge was of opinion that the Small Cause Court was wrong in holding that a witness could not be prosecuted for perjury on the basis of his deposition recorded by a Small Cause Court. He, however, dismissed Kalu's application by observing as follow:—

"It is undoubtedly important that perjury and forgery should be checked by prosecutions from time to time. But at the present moment the Civil Courts of the Khandwa District have already got 4 or 5 such cases pending in the Criminal Courts. I think these cases will be sufficient for giving the litigating public a sharp lesson. At present I think it is unnecessary to file any more complaints which would only add a greater burden to the Magistrates of the District who at present are somewhat hard pressed. Another consideration is that the alleged perjury took place a long time ago. A third consideration is that if I as District Judge file a complaint I should be unable to dispose of the almost inevitable Criminal Appeal as Sessions Judge."

From the above observations of the learned District Judge, it would appear that he has dismissed Kalu's application on 3 grounds. One of these grounds is that there was considerable delay on the part of Kalu.

It appears that Tikaram was examined as a witness in the Small Cause Suit on 5th December 1922 and the suit was disposed of on 10th April 1923. On 11th June 1923 that is two months after the disposal of the suit Kalu made his application. This delay of two months, which included 1 month and 5 days on account of the summer vacation of 1923, cannot be regarded as unreasonable delay. The learned District Judge seems to have been of opinion that Kalu should have presented his application immediately after Tikaram was examined as a witness in the Small Cause Suit and should not have waited for the disposal of that suit. If that is his opinion, it is clearly wrong; for the law is perfectly clear that proceedings under s. 476, Cr. P. C., should not be taken until the case, in which the alleged false evidence was given, has been finally disposed of. Such a hasty proceeding, as placing a witness on a trial as an accused immediately after he has given his evidence, is bad because the obvious result of such a step would be to intimidate subsequent witnesses and defeat the object of the trial. The proper time to apply under s. 476 for the prosecution of witnesses for perjury is after the final disposal of the suit in which he was examined as a witness.

The other two grounds given by the learned District Judge in dismissing Kalu's application are extra-judicial and scarcely deserve any consideration. He should have based his conclusion on judicial grounds after a careful consideration of the evidence on record and the circumstances of the case. The main question, which he should have considered, was whether there was a

reasonable probability of Tikaram's conviction for perjury: *Sheoshankarpuri* v. *Emperor* (1). Instead of doing so he acted on more or less fanciful grounds, grounds so obviously meaningless that he could not be said to have formed a judicial opinion at all. That being so, this Court has power to interfere in revision: *In the matter of the petition of Alamdar Husain* (2).

The learned Pleader who appears for non applicant Tikaram in this Court frankly admits that he is not prepared to support the order of the District Judge on the grounds mentioned in that order, but he contends that Kalu's application ought to be dismissed as Tikaram cannot be prosecuted on the basis of his deposition recorded in the Small Cause suit. In support of his contention he relied on *Emperor* v. *Nabab Ali Sarkar* (3) and *Imam Din* v. *Niamat Ullah* (4). In both these cases it has been held that omission to read over to a witness his deposition in accordance with O. XVIII, r. 5 of the C. P. C., renders the same admissible in evidence against him on his subsequent trial for forgery, and that oral evidence of its contents is excluded by s. 91 of the Evidence Act. As against these decisions there is a decision of this Court, *viz.*, *Mira Bax* v. *Emperor* (5) in which following the case of *Elahi Baksha Kazi* v. *Emperor* (6), it has been held that the provisions of O. XVIII, rr. 5 and 6 are directory and not mandatory and that non compliance with them does not render the deposition inadmissible at a subsequent trial of the doponent for perjury. It has further been held in that case that s. 91 of the Evidence Act merely excludes the oral contents of a deposition but does not make it inadmissible in evidence.

In the present case it is unnecessary to decide which of these two sets of decisions is correct. Under O. L, r. 1 (*b*) of the C.P.C. Order XVIII, rr. 5 to 12 have no application to Courts constituted under the Provincial Small Cause Courts Act or to Court exercising the jurisdiction of the Court of Small Causes. It, therefore, follows that it is not incumbent on a Small Cause Court Judge to read over to witnesses their depositions recorded by him, and the depositions so recorded would be clearly admissible in evidence against those witnesses in the event of their prosecution for perjury.

As the District Judge, Khandwa, dismissed Kalu's application on wholly erroneous and untenable grounds without applying his judicial mind to the consideration of the main question involved in the case, namely, whether there was sufficient foundation for a charge of perjury against Tikaram and a reasonable probability of his conviction, the case is remanded to his Court for the disposal of Kalu's application according to law.

G. R. D. *Case remanded.*

(1) 27 Ind. Cas. 545; 10 N. L. R. 177; 16 Cr. L. J. 161.
(2) 23 A. 249; A. W. N. (1901) 59.
(3) 81 Ind. Cas. 803; 51 C. 236; (1924) A. I. R. (C.) 705; 25 Cr. L. J. 1027.
(4) 58 Ind. Cas. 830; 1 L. 361; 21 Cr. L. J. 830; 10 P. W. R. 1920 Cr.
(5) 68 Ind. Cas. 36; 18 N. L. R. 192; 23 Cr. L. J. 500; (1923) A. I. R. (N.) 39.
(6) 45 Ind. Cas. 258; 45 C. 825; 27 C. L. J. 377; 22 C. W. N. 646; 19 Cr L. J. 498.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 453 OF 1923.

July 23, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Moti Sagar.

EMPEROR—APPELLANT

versus

MIHAN SINGH—RESPONDENT.

Criminal Law Amendment Act (XIV of 1908), s. 17 (1), (2), scope of—Penal Code (Act XLV of 1860), ss. 107, 108, 109, 117—Instigation to form unlawful association—Offence—Abetment, what amounts to—"Instigation," meaning of.

Sub-ss. (1) and (2) of s. 17 of the Criminal Law Amendment Act, postulate the existence of an unlawful association at the time when the acts specified in the sub-sections are committed. Anything done before the coming into existence of such an association, therefore, does not fall within the purview of either sub-s. (1) or sub-s. (2) of s. 17 of the Act.

A person, however, who instigates the formation of an unlawful association, abets such formation, and as any one becoming a member of such association or contributing towards the funds of such association, would be guilty of an offence under s. 17 of the Criminal Law Amendment Act, the person who abets the formation of such an association is guilty of the abetment of an offence, and if the number of persons who are instigated exceeds ten, the instigation brings him within the ambit of s. 117 of the Penal Code and renders him liable to the punishment provided therein. [p. 396, col. 1.]

A person abets the doing of a "thing" who instigates a person to do that thing, and if the "thing" instigated

is an offence, the instigator abets an offence, and if the offence is committed in consequence of the abetment and no express provision is made by the Penal Code for the punishment of such abetment, he is liable to the punishment provided for the offence. [p. 395, col. 2.]

A person is said to "instigate" another to an act when he actively suggests or stimulates him to the act, by any means or language direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement. [*ibid.*]

In re Lakshminarayana Aiyar, 42 Ind. Cas. 989; 22 M. L. T. 373; 6 L. W. 677; (1917) M. W. N. 831; 19 Cr. L. J. 29, relied on.

Appeal from an order of the Sessions Judge, Ludhiana, dated the 6th February 1923, reversing that of the Magistrate, First Class, Ludhiana, dated the 19th December 1922.

The Government Advocate, for the Appellant.

Mr. *Dasaundha Singh*, for the Respondent.

JUDGMENT.

Broadway, J.—Sardar Bahadur Mihan Singh, his brother Sobha Singh, his son Hari Singh and four other persons were tried together on a charge under s. 17 (2) of the Criminal Law Amendment Act, XIV of 1908. They were all convicted by the Trying Magistrate and an appeal to the learned Sessions Judge was dismissed so far as all the appellants other than Sardar Bahadur Mihan Singh were concerned. The learned Sessions Judge, while holding that the unlawful association which formed the subject-matter of the trial had come into existence at, and through, the instigation of Sardar Bahadur Mihan Singh, held that Mihan Singh had not become a member of the said unlawful association and came to the conclusion that he had not brought himself within s. 17 (1) or (2) of the Criminal Law Amendment Act. Without any real discussion of the oral evidence produced by the prosecution he held it to be unreliable. Sardar Bahadur Mihan Singh having been acquitted an appeal under s. 417, Cr. P. C., has been filed by the Crown. The learned Government Advocate has been heard in support of the appeal while Mr. Dasaundha Singh represented Sardar Bahadur Mihan Singh.

The facts are detailed in the judgments of the Courts below and briefly stated are as follows:—

During the winter of 1921-22 a number of *Akali Diwans* were held at various villages in the Ludhiana District. Sardar Bahadur Mihan Singh has certain ancestral property in Bagrian. He is also a grantee of land in Hanumangarh in the Multan District. Apparently he lives at Hanumangarh although he draws a pension of about Rs. 150 a month from the post office at Malerkotla, the nearest post office to Bagrian. His ancestral property which is, apparently, not of any great value is looked after by his son Hari Singh. It is in evidence that towards the end of December 1921 or the beginning of January 1922 Sardar Bahadur Bhai Arjan Singh of Bagrian learnt that certain persons in his village contemplated holding a political *diwan* there. He accordingly sent for the leading spirits and remonstrated with them and was under the impression that he had succeeded in persuading them to give up the idea.

About the 17th of January 1922 Sardar Bahadur Mihan Singh came to Bagrian and, according to the evidence for the prosecution addressed the people at the village gate. He is said to have stated that the British *Raj* had come to an end, or at any rate was about to do so, and exhorted the people to hold a *diwan* and take steps to establish an independent State at Bagrian. He called on them to refuse to pay land revenue and to decide all disputes among themselves without reference to the Courts of law. After staying at Bagrian for two or three days Sardar Bahadur Mihan Singh went away and immediately after his departure an unlawful association was formed of which Hari Singh, the son of the Sardar, was made the Secretary, and Sobha Singh, the Sardar's brother, the Vice-President, other office-holders being also appointed. It is also said that when he was exhorting the people to form this independent State he had told them that he had himself contributed Rs. 2,000 towards the movement which had been given to his son and the people could go to his son to have their names registered. Subsequent to the formation of this unlawful association *diwans* were held of a political nature, and there can be no doubt whatever that this association and its subsequent activities came within the purview of s. 17 (2) of the Criminal Law Amendment Act. The questions for decision are whether the prosecution has proved that Sardar Bahadur Mihan Singh was in the village on the 17th January 1922, *secondly* whether he made the statements attributed to him at the village gate, and, finally whether his action in so doing amounts to an offence under the

Criminal Law Amendment Act or the Indian Penal Code.

As to the first point, Sardar Bahadur Mihan Singh has strenuously denied having gone to Bagrian on the 17th January 1922. The evidence on the record, however, leaves no doubt whatever that he did go to Bagrian on that date. The evidence for the prosecution as to Sardar Bahadur Mihan Singh's presence is really incontrovertible and the fact that he made a certain payment there on the 17th January 1922 to his son Hari Singh is beyond doubt. The story told by the Sardar that he was on bad terms with Hari Singh and that his daughter-in-law had sent a message to him at Multan through one Harnam Singh that she stood in need of money and that he had thereupon gone with Harnam Singh to Malerkotla and drawn his pension which he had made over to Harnam Singh to be conveyed to his daughter-in-law is utterly improbable and is further negatived by the fact that in Hari Singh's pocket book there is an entry dated the 17th January 1922 in which it is distinctly stated that his father (the Sardar) had brought his pension and money from the *chak* to the extent of Rs. 860.

As to the second point, there is evidence to show that the Sardar exhorted the people to combine and establish an independent *raj*, refuse to pay revenue and to register their names with his son to whom he had paid a contribution of Rs. 2,000. Doubtless some of the witnesses are partisans of Bhai Arjan Singh, nevertheless I am unable, after carefully examining their depositions, to see any reason to doubt the truth of their story, and in my opinion it has been established that the Sardar did exhort the people to combine for the purposes stated above. It has been argued very strenuously that it has not been proved that he paid Rs. 2,000 to his son. That is so, but that does not to my mind negative the story told by the witnesses, for not a single witness professes to have seen any payment made and whether the payment of Rs. 860 to his son on the 17th January was or was not intended as a contribution is not of importance at this stage. It is not the fact of the contribution so much as the assertion that it had been made that is of importance in this connection. I think, therefore, that it has been established on the record as held by the Magistrate that Sardar Bahadur Mihan Singh did, as a matter of fact, instigate the formation of this association, as association which when formed was undoubtedly an unlawful one as defined by s. 15 of the Criminal Law Amendment Act.

In arriving at the above conclusions the defence evidence has not been lost sight of. That evidence is, however, wholly unworthy of credence and cannot be considered sufficient to rebut the prosecution evidence. Neither of the Courts below have been able to accept it and Mr. Dasaundha Singh obviously placed very little faith in it himself. Though he felt constrained to read it out and refer to it, he was unable to ask for its acceptance with any degree of conviction.

As to the actual payment of a contribution by the Sardar, as stated above, there is no direct evidence. That he announced his having subscribed Rs. 2,000, I have no doubt, and I think there is some force in the learned Government Advocate's contention that the statement that the subscription amounted to Rs. 2,000 was probably a little exaggeration.

The entry in Hari Singh's pocket book under date 17th January 1922 showing a receipt from Mihan Singh of Rs. 860 is of considerable importance in this connection and the palpably false evidence of this payment to Hari Singh is significant. There can be no doubt at all that father and son were on the best possible terms, and the payment to Hari Singh of this sum of Rs. 860 on that date, coupled with the announcement that a contribution of Rs. 2,000 had been made, point very strongly to the payment having been made as a subscription and for the purpose of being utilized for the objects of the association, the formation of which Mihan Singh was advocating. It was strongly urged that having regard to his previous excellent record in the army, it was highly improbable that Mihan Singh would have spoken and acted as stated by the prosecution witnesses. Now Mihan Singh's record of service in the army is an exceptionally good one, nevertheless as pointed out by the learned Government Advocate. the situation was such that there is nothing really surprising in a man in Mihan Singh's position adopting the line of conduct attributed to him. The *Akali* agitation was in full vigour and Sobha Singh and Hari Singh had obviously come under its influence and it is, therefore, by no means improbable that he was carried

away by the same forces that had influenced his brother and son.

The next point for consideration is whether Mihan Singh's words and actions constitute an offence either under the Criminal Law Amedment Act or the Indian Penal Code.

It was contended by the learned Government Advocate that by instigating the formation of the unlawful association which actually came into existence a few days after the 17th January 1922 and by contributing to its funds Mihan Singh became liable under s. 17 (1) and (2) of the Criminal Law Amendment Act. He urged that s. 17 (2) was applicable for the reason that by contributing to the funds of the said association he "assisted in the management" of the unlawful association and that the same facts also rendered him punishable under s. 17 (1).

On the other hand Mr. Dasaundha Singh contended that as, admittedly, no unlawful association was in existence at the time when the alleged instigation and payment of the contribution took place, neither cl. (1) nor cl. (2) of s. 17 had any application

So far as s. 17 (2) is concerned, it seems clear that the phraseology postulates the existence of an unlawful association at the time when assistance in its management is rendered and, therefore, I do not think that this section has any application.

Section 17 (1) runs as follows:—

"Whoever (*a*) is a member of an unlawful association,

(*b*) or takes part in meetings of any such association,

(*c*) or contributes or receives or solicits any contribution for the purpose of any such association,

(*d*) or in any way assists the operations of any such association," shall * * *

(*a*) and (*b*) clearly postulate an unlawful association being already in existence and I think that the same applies to (*d*). The position in regard to (*c*) is not quite so clear. A man who instigates the formation of an association, the purposes of which are such as to render that association unlawful and contributes to and solicits contributions for that association may, broadly speaking, be considered to have contributed to and solicited contributions for the purpose of such association, but a penal Statute has to be construed strictly and it may also be argued that before an association can have a purpose it must be in existence and that any contribution to or solicitation for such an association prior to its formation cannot render a person amenable to s. 17 (1) and after a careful consideration of the section in its entirety I think that the intention of the Legislature was to render punishable only such contributors, etc., who contributed or solicited contributions for the purpose of an *existing* association.

In my opinion, therefore, Mihan Singh cannot be held to have committed an offence either under cl (1) or cl. (2) of s. 17 of the Criminal Law Amendment Act.

Mr. Jai Lal next contended that inasmuch as an association "which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts" is an "unlawful association" [s. 15 (2) (*a*)], the instigation to the formation of such an association and the contribution and solicitation of money for the purpose of such an association amount to abetment of the offences made punishable by s. 17 (1) (2), Criminal Law Amendment Act; and further, inasmuch as the abetment in this case was the abetment of an offence by a number or class of persons *exceeding ten*, the offence committed was one falling within the purview of s. 117, Indian Penal Code.

Now a person abets the doing of a "thing" who instigates a person to do that thing (s. 107, Indian Penal Code) and if the "thing" instigated is an offence, the instigator abets an offence (s. 108, Indian Penal Code) and if the offence is committed in consequence of the abetment, and no express provision is made by the Indian Penal Code for the punishment of such abetment, he is liable to the punishment provided for the offence.

A person is said to "instigate" another to an act when he actively suggests or stimulates him to the act, by any means or language direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement (1 Russ. 164 ?) Again it has been held that the word "instigate" means—urge on, incite, bring about by persuasion, provoke [*In re Lakshminarayana Aiyar* (1)].

In the present case I have no hesitation in holding that Mihan Singh did instigate the formation of an association and, there-

(1) 42 Ind. Cas. 989; 22 M. L. T. 373; 6 L. W. 677; (1917) M. W. N. 831; 19 Cr. L. J. 29.

fore, abetted its formation. Further inasmuch as the objects and purpose of this association were clearly (and to his knowledge) of such a character as to constitute it an unlawful one, and as any one becoming a member of it or contributing funds to it would be guilty of an offence under s. 17 (1), Criminal Law Amendment Act, Mihan Singh's act amounted to an abetment of an offence. Again, as this abetment was of the commission of an offence by a class of persons clearly exceeding ten Mihan Singh has brought himself within the ambit of s. 117, Indian Penal Code, and has rendered himself liable to the punishment provided therein.

I would, therefore, accept this appeal and convict Mihan Singh of an offence under s. 117, Indian Penal Code. Having regard to his previous excellent record and the fact that he has not been shown to have taken any further part in this affair and refrained from joining or taking part in any such movement in the Multan District, where he, for the most part, resides, I think a sentence of fine would meet the situation. I would, therefore, sentence him to pay a fine of two hundred rupees or in default to undergo rigorous imprisonment for six months.

Moti Sagar, J.—I concur.

Z. K. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS Nos. 185, 202 AND 205 OF 1924.

January 20 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

TILLOCKCHAND AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Bombay Prevention of Gambling Act (IV of 1887), ss. 4, 5, 6—Search warrant—Honorary First Class Magistrate, jurisdiction of, to issue warrant—Presumption—Gambling, what is.

An Honorary First Class Magistrate has power to issue a search warrant as defined in s. 5 of the Bombay Prevention of Gambling Act, provided he is a Magistrate for the local area in which the premises are situate in respect of which he issues a search warrant. [p. 397, col. 1.]

If a warrant issued under s. 6 of the Bombay Prevention of Gambling Act is a regular warrant, a presumption arises that the premises were used as a common gaming house and, therefore, that the persons playing on those premises were guilty of an offence under s. 5 of the Act. [p. 396, col. 2.]

The essence of the offence of gambling is that the game played is not a game of skill but of chance and that in view of the number, position and income of players the game is one where loss might be the result not of a lack of skill but of lack of luck. [p. 397, col. 1.]

Application for revision against an order of the City Magistrate, Karachi, dated the 9th October 1924.

Mr. *Partabrai D. Punwani*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—In these cases Phatumal Oochiram was convicted of keeping a comon gambling house under s. 4 of Bombay Act IV of 1887 and accused Nos. 1—8 were convicted of gambling in that gambling house. The evidence is that the premises belonged to Phatumal Oochiram and that the accused Nos. 1—8 were indubitably found there playing with cards. A warrant was issued for the search of the premises by a certain Honorary First Class Magistrate. There is no doubt if that was a regular warrant the presumption does arise that the premises were used as a common gaming house and, therefore, that the persons so playing on those premises were guilty of an offence under s. 5.

The first question, therefore, for decision is whether the warrant was properly issued.

The Magistrate who issued the warrant, as has been stated before, was an Honorary First Class Magistrate and it is urged that he had no power to issue a warrant. But whatever the powers of the Honorary Magistrate may be under the Cr. P. C. there is nothing in the Bombay Gambling Act which requires that a Magistrate issuing a warrant thereunder should be vested with any special jurisdiction. All that is required is that there should be a warrant by a First Class Magistrate and indubitably the gentleman who issued the warrant in this case is a First Class Magistrate. It is to be noted that under the present Cr. P. C. one of the ordinary powers vested in a First Class Magistrate is that of issuing a search warrant. A First Class Magistrate might actually be prohibited by executive orders from exercising any jurisdiction legally vested in him, but the mere fact that he is directed merely to exercise certain powers does not deprive him of any inherent rights vested in him by law. We, think, therefore,

that an Honorary First Class Magistrate may well issue a warrant as defind in s. 5 of the Act. Section 6 of the Gambling Act provided that he is a Magistrate for the local area in which the premises are situate in respect of which he issues a warrant.

We think, therefore, that the warrant was a good warrant and, therefore, the ordinary presumption arises. But it was, of course, open to the accused Phatumal who was convicted as being the keeper of the common gambling house under the Gambling Act to disprove that the other accused were as a matter of fact gambling. It does look rather as if the Magistrate has devoted his mind exclusively to the question whether cards had been played there and had not sufficiently considered whether the persons on that premises were, as a matter of fact, gambling. Now, it appears that all these people, as a matter of fact, are men of respectable character, and all almost engaged in the same class of business, namely, brokerage and commission agents and that the meeting was more or less of a social character principally for the purpose of having a common dinner. In such circumstances, it is not clearly made out that they were there present for the purpose of gambling. It may well have been that they may have played at cards also for whiling away time and as a matter of recreation while meeting together for social purposes. Where such circumstances exist the presumption arising under s. 6 of the Gambling Act must be held to be very much extenuated because it is well-known that presons of highest respectability on such occasions do play cards for small stakes by way of recreation. Moreover, there is no evidence on the record as to what the nature of the game was. There is no doubt a presumption from the use of instruments of gambling like cards that gambling has taken place yet where the circumstances are ambiguous as in the present case, it would have been more desirable that there should be some evidence that game actually being played at the moment was not a game of skill but of chance and that in view of the number and position and the income of players the game was one where loss might be the result not of lack of skill but of lack of luck and that I take it is the essence of the offence of gambling.

As these points are not clearly brought out we think that the benefit of doubt should be given to all the parties concerned and their convictions and sentences are set aside. Fines if paid, to be refunded.

Z. K. *Application accepted.*

LAHORE HIGH COURT

CRIMINAL REVISION No. 219 OF 1924.

March 19, 1924.

Present:—Mr. Justice Abdul Raoof.

KHAN ZAMAN KHAN—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439—Case doubtful—Accused discharged—Order of discharge, whether foolish and perverse—Re-trial.

If after fully considering the evidence in a case the Trying Magistrate comes to the conclusion that the evidence against the accused is doubtful and discharges him accordingly, it cannot be said that the order of discharge is foolish and perverse to justify a re-trial.

Criminal revision against an order of the Sessions Judge, Attock at Campbellpore, dated the 2nd January 1924.

Lala *Jagan Nath Bhandari*, for Mr. *M. S. Bhagat*, for the Petitioner.

Mr. *Zafrulla Khan*, for the Government Advocate, for the Respondent.

JUDGMENT.—The learned Sessions Judge has set aside the order of discharge and ordered re-trial of the petitioner Khan Zaman upon two grounds

1. That the medical evidence shows that one of the five incised wounds was caused by a hatchet and four by a knife and that this pointed to two assailants; and

2. that the Magistrate in his judgment says that Azam alone of the four prosecution witnesses was inimical to Khan Zaman while in his order of discharge he says that all the prosecution witnesses are against him.

After carefully considering the evidence and the circumstances of the case I am constrained to hold that the learned Sessions Judge was not justified in order in a re-trial in this case. The medical evidence does not definitely state that one of the wounds was caused by a hatchet and four by a knife.

All that is stated is that the injuries had been caused with some sharp edged weapon such as a big knife and that the injury No. 3 might have been caused with a hatchet,

The first ground, therefore, cannot be sustained.

As regards the second ground the following facts appear. Mir Alam (P. W. No. 4) is the real brother of the complainant Karam Khan, and Khushal Khan is also a close relation of the complainant, being a *khalu* (mother's sister's husband), Azam Khan has himself admitted that there is enmity between him and Khan Zaman. The Magistrate in his order of discharge says that the witnesses were against Khan Zaman, that is to say, antagonistic towards him. It is impossible to say that the Magistrate was not justified in taking this view. If after considering the evidence he came to the conclusion that the case against the petitioner, Khan Zaman, was doubtful, one cannot find any fault with him. It cannot be said that his judgment was foolish and perverse. The case clearly comes within the rule laid down in *Nabi Bakhsh* v. *Emperor* (1).

I, therefore, accept this petition for revision and set aside the order of re-trial of the petitioner.

S. D. *Petition accepted.*

(1) 56 Ind. Cas. 777; 1 L. 216; 21 Cr. L. J. 521; 109 P. L. R. 1920; 8 P. W. R. 1920 Cr.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 75 OF 1925.

April 29, 1925.

Present :—Mr. Findlay, Offg. J. C.

AKBAR HUSSAIN—ACCUSED—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 423—Penal Code (Act XLV of 1860), ss. 420, 471—Cheating—Using forged document as genuine—Appeal—Conviction under s. 420, whether can be converted into one under s. 471—Notice to accused—Prejudice—Knowledge of forgery, proof of.

The offence of cheating under s. 420 of the Penal Code is an entirely different offence from that under s. 471 of the Code, *viz.*, using as genuine a forged document knowing it as such, and a conviction for the former offence cannot be altered by an Appellate Court into one for the latter offence unless the accused has notice of the fact and is not prejudiced by the want of notice. [p. 398, col. 2.]

Yakub Ali v. *Lethu Thakur*, 30 C. 288, followed.

In the absence of proof that the accused knew that the document produced by him was forged or of such circumstances that it can be presumed that he had the necessary knowledge of its being forged, he cannot be convicted under s. 471 of the Penal Code. [p. 399, col. 1.]

Criminal revision against the judgment of the Sessions Judge, Nagpur, dated the 14th March 1925, in Criminal Appeal No. 6 of 1925.

Mr. *S. K. Barlingay*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The applicant, Akbar Husain, was charged and convicted by the First Class Magistrate, Nagpur, of two offences: one under s. 468, or in the alternative 468 109, Indian Penal Code, and the other under s. 420, Indian Penal Code, and sentenced to three months' rigorous imprisonment for each offence, the sentences to run consecutively. For the offence under s. 420 he was also sentenced to a fine of Rs. 100.

On appeal the Sessions Judge Nagpur, altered the conviction to one under s. 468/471, Indian Penal Code, and maintained the sentence of three months' rigorous imprisonment and fine.

The facts of the case are sufficiently clear from the judgments of both the Courts below. In a word, the prosecution case against the appellant is that he produced on the 2nd of July 1924 at Nagpur octroi *naka* No. 5 the receipt (Ex. P-1) under which he, on the face of it, was entitled to bring in 17 logs of wood. The prosecution case is that the number 21 shown on the receipt is a forgery, and this has been abundantly proved, nor has the point been disputed in this Court. The receipt had been originally issued to one Jagya on the 27th of March 1922 at the Indora *naka* and there is nothing to show how, if it ever did the receipt came into the appellant's hands. The appellant's case was that he did not present the receipt at all and that the whole case against him is a false and malicious one instituted because he has been at loggerheads with the octroi officials, and particularly with Suraj Prasad (P. W. No. 1)

In the first place, I desire to point out that I do not think the conviction under s. 471 could possibly be maintained in the present case. This was an entirely different offence from that charged by the Magistrate, and it would be impossible to postulate that the appellant was not prejudiced by having no notice that he was to be convicted of the offence under s. 471. *cf. Yakub Ali* v. *Lethu Thakur* (1). At the very best for the prosecution, therefore, I should have had, in any event, to consider whether the evidence against the appellant was sufficient to justify

(1) 30 C. 288.

me to order a re-trial. On the facts of the case, however, it seems to me a far too doubtful one for this step to be necessary. Even if we assume the very worst for the applicant, *viz.*, that he did produce the pass in question at the octroi *naka*, there is, of course, no evidence that he actually forged it himself, nor, in my opinion, are the circumstances such that it can be presumed that he had the necessary knowledge of its being forged. *Prima facie*, in view of his admittedly bad relation with the octroi officials, it would seem very unlikely that he would delibrately put his neck into the noose by producing a forged pass in the way he is said to have done, but, over and beyond this, it does not seem to me that the circumstances of the present case are sufficient to entitle me to assume that, even if the applicant did present the pass, he knew it was forged : *cf. Empress* v. *Rango Timaji* (2).

The facts of the case reported in *In the matter of the petition of Ranchhoddas Nagardas* (3) are somewhat apposite in this connection. I should have, in any event, found it difficult to presume in the present case that a busy merchant like the applicant would have necessarily noticed the forgery. But even if carelessness on his part be postulated, that would not in itself be a sufficient ground for conviction. It seems to me perfectly possible in the present case that the applicant may have been hoodwinked by Jagya or some other party into accepting the receipt in question without ever noticing that it was forged, and on this view of the case the applicant is certainly entitled to the benefit of the doubt. In the view I take of the case, there is, therefore, a very large margin of doubt left and I think the applicant is clearly entitled to the benefit thereof.

I may add that I am not at all satisfied with the prosecution evidence. There is clealy bad feeling between the applicant and some of the octroi officials, and the first three witnesses contradict one another badly as regards the applicant's presence at the octroi post. In those circumstances the somewhat cogent evidence of Dr. C. J. Fernandez (D. W. No. 1) could only be rejected after very careful consideration, but it seems to me unnecessary for this Court, sitting as a Court of revision, to give a definite finding on the credibility of the prosecution witnesses and of Dr. Fernandez respectively.

For the reasons given above, neither the offence under s. 468, nor s. 471, Indian Penal Code, is in my opinion, made out and the case is a far too doubtful one to allow the conviction to stand. The conviction and sentence passed by the Sessions Judge are accordingly reversed and the applicant is acquitted and will be at once released. The fine, if paid, will be refunded.

G. R. D.
Z. K. *Application accepted.*

(2) 6 B. 402; 6 Ind. Jur. 538; 3 Ind. Dec. (N. S.) 724.

(3) 22 B. 317; 11 Ind. Dec. (N. S.) 793.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1485-A OF 1924.
February 5, 1925.
Present:—Mr. Justice Carr.
EMPEROR—PROSECUTOR
versus
NGA THA BAY—ACCUSED.

Burma Habitual Offenders' Restriction Act (II of 1919), ss. 9, 18—Conviction under s. 18 (1)—Fresh term of restriction, whether can be imposed—Period of absence from tract and period spent in trial, whether can be excluded.

Section 9 of the Burma Habitual Offenders' Restriction Act does not authorize the addition of a term of restriction to the sentence in the case of a conviction under s. 18 of the Act. [p. 400, col. 1.]

Section 18 (2) of the Burma Habitual Offenders' Restriction Act provides only that a period of imprisonment under sub-s. (1) of the section is to be excluded in computing the period for which the order of restriction shall remain in force. It does not permit the exclusion of any period during which the accused has been absent from his tract in contravention of the order or of any period during which he has been under trial. [*ibid.*]

Criminal revision from an order of the Sessions Judge, Bassein, in Criminal Appeal No. 498 of 1924.

JUDGMENT.—The accused in this case was subject to a restriction order for three years from the 25th January 1923. He carried out this order until the 6th June 1924, that is, for a period of one year, four months and twelve days. Then he left his tract without permission. He was arrested on the 13th July and was sent up for trial and on the 19th August was convicted under s. 18 of the Habitual Offenders' Restriction Act and was sentenced to six

months' rigorous imprisonment. At the end of his judgment the Magistrate added, "After his release from jail Nga Tha Bay will go back to Thayagon and stay there for one year and eighteen months on the conditions imposed by the Sub-Divisional Magistrate, Kyonpyaw."

Considered as a fresh order of restriction this order was illegal, since s. 9, Habitual Offenders' Restriction Act, does not authorize the addition of a term of restriction to the sentence in the case of a conviction under s. 18.

But I think that the Magistrate did not intend it as a fresh order of restriction, but as a carrying out of the provisions of s. 18 (2). I will take it also that "eighteen" was a clerical error and that the Magistrate meant to write one year and eight months.

Even so the order was wrong. Section 18 (2) provides only that a period of imprisonment under s. 18 (1) is to be excluded in computing the period for which the order of restriction shall remain in force. It does not allow of the exclusion of any period during which the accused has been absent from his tract in contravention of the order or of any period during which he has been under trial. The effect of the sentence was, therefore, only to extend the duration of the restriction order for a period of six months beyond the 24th January 1926, on which date it would normally have expired. Thus the order would remain in force for a period of one year and a little over five months from the date of the accused's release at the expiry of his sentence, and not for one year and eight months.

And I do not think that the Magistrate should have made the order in his judgment at all. He had in fact no power to make any order at all since the period of restriction is extended by the operation of law and is not within the discretion of the Magistrate. He might profitably have explained to the accused the provisions of s 18 (2) and thier effect on his period of restriction and have noted in the case diary that he had done so. But in doing so he should have been careful to do so correctly.

The Sessions Judge should have discovered these errors, but he merely dismissed the appeal summarily

I confirm the conviction and sentence of imprisonment passed on Nga Tha Bay, but set aside the order directing him to stay at Thayagon for one year and eighteen months after his release from Jail.

The original restriction order will, of course, remain in force as provided by s. 18 (2) of the Habitual Offenders' Restriction Act.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 162 OF 1924.

February 29, 1924.

Present:—Mr. Justice LeRessignol.

KALA AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 225-B—Criminal Procedure Code (Act V of 1898), s. 110—Security proceedings—Arrest without warrant, legality of—Escape from unlawful custody—Offence.

A Police Officer has no authority to arrest without a warrant a person against whom proceedings have been instituted under s. 110 of the Cr. P. C. Where such a person is arrested by the Police without a warrant and escapes from the custody of the Police, he is not guilty of an offence under s. 225-B of the Penal Code inasmuch as the arrest was illegal.

Petition, under s. 439, Cr P. C., for revision of the order of the Additional Sessions Judge, Lahore, dated the 21st January 1924.

Mr. *Aziz Ahmed*, for the Petitioners.

JUDGMENT.—The action of the Police in arresting the petitioner Kala was not justified by law and the petitioner in escaping from unjustified arrest committed no offence. The Police reported against the petitioner under s. 110, Cr P. C, and the Magistrate might have issued a summons or in a very special case, even a warrant It issued neither, and the arrest by Police was unauthorised.

I accept the petition and setting aside the convictions under s. 225 B, Indian Penal Code acquit the petitioners.

Z. K. *Petition accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 514 OF 1921.
EXECUTION MISCELLANEOUS No. 992 OF 1924.
April, 3, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF FATEHCHAND MADAN GOPAL—JUDGMENT-CREDITORS—PLAINTIFFS

versus

FIRM OF UTANMAL JHAMANDAS—JUDGMENT-DEBTORS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. III, r. 2 (4), O. XXI, rr. 37,50, O. XXX, rr. 3, 5, 6—Suit against firm—Service of summons—Partner or manager—Appearance under protest—Vakalatnama, *form of—Execution of decree—Special leave, whether necessary—Arrest of judgment-debtor outside jurisdiction, legality of.*

When a summons in a suit instituted against a firm is served on the manager of the firm under O. XXX, r. 3 (*b*), C. P. C., there is no obligation on him to appear in Court. [p. 401, col. 2.]

When a person appearing in a suit in answer to a summons issued on a firm does not at any stage of the proceedings aver that he is only a manager, he must be decreed to be a partner. [p. 402, col. 1.]

Where a summons is issued on a firm and it is served in the manner provided by r. 3 of O. XXX, C. P. C., every person on whom it is served must be informed by a notice in writing given at the time of such service whether he is served as a partner or as a person having the control or management of the partnership business or in both characters and in default of such notice, the person must be deemed to be served as a partner. [*ibid*]

The failure to give such notice exposes the plaintiff to the risk of being liable for costs of the persons served appearing under protest under O. XXX, r. 8, C. P. C. [*ibid.*]

But where the person so served puts in an unconditional appearance he must be held liable as a partner of the firm and special leave under O. XXI, r. 50 (2), C. P. C., is not required for executing the decree against him. [*ibid.*]

When a person served with the summons desires to appear under protest, the *vakalatnama* filed by him should clearly state that he appears individually in his own name. Where a *vakalatnama* is filed by a Manager as the recognized agent of a firm under O. III, r. 2, cl. (*b*), C. P. C., it should be so stated to avoid subsequent litigations and delay in the disposal of the suit and in execution proceedings. [p. 402, col. 2.]

A Court cannot, in execution of a decree, arrest a judgment-debtor who is not within the jurisdiction. [*ibid.*]

Mr. *E. V. Castollino*, for the Plaintiffs.

Mr. *Srikishendas H. Lulla*, for the Defendants.

ORDER.—One Jhamandas Radhomal has been served with a notice under O. XXI, r. 37, C. P. C. to show cause why he should not be arrested in execution of a decree passed by this Court against the firm of Uttanmal Jhamandas as being one of the partners of that firm. This notice was served on him at Shikarpur outside the ordinary jurisdiction of this Court, the service being effected through the Subordinate Court at Shikarpur. Two objections have been raised on his behalf. Firstly, that he was served with a summons in the suit as manager of the firm of Uttanmal Jhamandas, that he appeared as such, and that notice under O. XXI, r. 37, C. P. C. could not. therefore, issue without special leave being applied for, and obtained under O. XXI, r. 50, cl. (2), C. P. C. Secondly, that a notice under r. 37, C. P. C. cannot be issued for service outside the jurisdiction of this Court.

There is no substance in either of these contentions. No special leave is required for executing a decree against a person who has either appeared in his own name under O. XXX, rr. 6 and 7 or who has admitted on the pleadings that he is a partner or who has been served as a partner with the summons: O. XXI, r. 50, cl. (*i*), sub-cls. (*b*) and (*c*).

It is abundantly clear on the pleadings and the record of the suit that Jhamandas appeared as a partner, that he is and has admitted himself to be a partner of this firm, and that he must be deemed to have been served as such.

The written statement is signed and verified by him as managing defendant. In the affidavit filed by him in answer to a notice issued on the defendants to show cause why their property should not be attached before judgment, he has identified himself with the partners of the firm. In para. 3 of the affidavit he has stated "that we have not closed out shop at all and that we own and run one in new market" In para. 10 of the affidavit again he has stated "that we own and possess.....both moveable and immoveable property at Shikarpur". This could only refer to the private property of the partners of the firm. On July 19th 1923, he obtained an adjournment of the case on giving an undertaking that the defendants would not alienate their property and on July 30th, 1923, he submitted to a consent decree. In both the orders he was referred to as the defendant. At no stage of the proceedings did he aver that he was only a manager.

As manager there was no obligation on him to appear in Court (O. XXX, r. 7, C. P. C.). It is no doubt true that in the heading of the plaint the defendants are described as follows:—"The firm of Uttanmal

Jhamandas consisting of more partners than one and carrying on business at Karachi by their manager whoever he may be in charge of the firm under O. XXX, r. 3, C. P C."

This mode of describing the defendants in the heading of the plaint is not warranted by O. VII, r. 1, cl. (*e*) read with O. XXX, r. 1, C. P. C. The words "by their manager, etc" are a surplusage. Rule 3 of O. XXX, C. P. C. which corresponds to r. 3 of O. XLVIII, Rules of the Supreme Court empowers the Court to direct a summons to be served either (*a*) upon one or more partners, or (*b*) at the principal place of business upon any person having the control or management of the business at the time of service. Rule 5 provides that "where a summons is issued to a firm and is served in the manner provided by r. 3, every person on whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and in default of such notice, the person served shall be deemed to be served as a partner." No written notice was given to Jhamandas at the time of service that he was being served as a manager, and, therefore, he must be deemed to have been served as a partner. I am aware that no such notice is given here in any case. The service effected here is through the Court process server who is often accompanied by any representative of the plaintiff. It is not effected through a Solicitor or a Pleader's clerk who may when he effects service on a manager give him the required notice. The failure to give the required notice exposes the plaintiff to the risk of being liable for costs of the person served appearing under protest under O. XXX, r. 8, C. P. C. But where the person so served puts in an unconditional appearance, there is no reason why the provisions of r. 5 should not come into operation. The summons issued in this case is directed to the defendants, and the fact that the defendants are described in the heading of the plaint in the manner referred to above, is no ground for holding that Jhamandas was thereby given notice as required by r. 5 that he was being served as a manager. Jhamandas must be deemed to have been served as a partner and to have appeared as such, apart from his having admitted on the pleadings to have been a partner. I may mention here that the *vakalatnama* filed by Jhamandas is not in strict compliance with r. 6 of the Order. It purports to be given on behalf of the defendants and is signed by him as Uttanmal Jhamandas per Jhamandas. It does not state in clear terms that he appears individually in his own name as required by this rule. It is desirable that a *vakalatnama* should conform to the rules and specify that it is given on behalf of the individual partner as such. Where a *vakalatnama* is filed by a manager as the recognized agent of a firm under O. III, r. 2, cl. (*b*), C. P. C., it should be so stated to avoid subsequent litigation and delay in the disposal of the suit and the execution proceedings. I hold that it was not necessary for the plaintiffs to apply for special permission to execute the decree against Jhamandas as a partner under O. XXI, r. 50, C. P. C.

The second objection is equally futile. I am prepared to accede to the contention that this Court cannot arrest the defendant unless he is within the jurisdiction of this Court. No attempt is being made to arrest him outside the jurisdiction of this Court. This notice could have been dispensed with altogether, and if it was issued by this Court, in order to give him an opportunity of showing cause why he should not be arrested when he is within the jurisdiction of this Court, it would appear that there are no grounds for challenging it. I, therefore, order a warrant of arrest to issue against the defendant Jhamandas, but this warrant is to be executed within the jurisdiction of this Court and not outside.

P. B. A. *Order accordingly.*

Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 49 OF 1925.

May 29, 1925.

Present:—Mr. Justice Sulaiman.

Dharamsala Lala KEOTI RAM—PLAINTIFF—APPLICANT

versus

LACHHMAN PRASAD—DEFENDANT—OPPOSITE PARTY.

Acknowledgment, suit whether can be based on.

A document which contains a mere acknowledgment of liability does not furnish an independent cause of action and cannot be made the basis of a suit. In a suit based on the original cause of action, however, such a document may be relied on as a piece of evidence in proof of the original obligation.

Civil revision from an order of the Judge of the Court of Small Causes, Shahjahanpur, dated the 13th January 1925.

Mr. *Panna Lal*, for the Applicant.

Mr. *B. Mullick*, for the Opposite Party.

JUDGMENT.—This is a civil revision from a judgment of the Judge of Small Cause Court at Shahjahanpur. The suit as brought was based on a *sarkhat* dated the 25th of November 1921. There was no mention of any previous connection between the parties, nor was there any mention that at any time account was adjusted, balance struck or account stated. The plaintiff relied entirely on the *sarkhat* by saying that the defendant having acknowledged liability and undertaken it had executed the *sarkhat*. The cause of action mentioned in the plaint was the date of the *sarkhat*. When the trial commenced the Counsel for both the parties declined to lead any evidence each thinking that the burden lay on the opposite side. The Court accordingly heard arguments and dismissed the suit.

I am of opinion that it is impossible to interfere with this order. The *sarkhat* was not a promissory note but a mere acknowledgment of a liability. It cannot be made the basis of a suit so as to constitute a fresh cause of action in favour of the plaintiff. The plaintiff, of course, if he had chosen could have fallen back on the original consideration and relied on the *sarkhat* as a piece of evidence in proof of the debt, but the date of the debt was unknown and it was not known whether the *sarkhat* was executed within the period of limitation or not. The learned Judge remarked that no such debt had been shown to have been acknowledged therein within limitation. The way in which the plaint was drafted and the refusal to lead any evidence by the plaintiff must entail the dismissal of the suit. The view of the Court below is supported by the authority of the case of *Ganga Prasad* v. *Ram Dayal* (1). The revision is accordingly dismissed with costs.

Z. K. *Revision dismissed.*

(1) 23 A. 502; A. W. N. (1901) 150.

LAHORE HIGH COURT.

CIVIL APPEAL No 255 OF 1921.

March 7, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

MOHAMMAD ALI—VENDEE-DEFENDANT—APPELLANT

versus

GULAB—PLAINTIFF AND ANOTHER—VENDOR-DEFENDANT—RESPONDENTS.

Custom—Alienation—Remote collateral's right to contest, when there are six near collaterals.

Where a remote collateral has no chance to succeed to the estate of an alienor until the lines of the six near collaterals become extinct the former's suit t contest the alienation is one of a speculative nature and should not be decreed.

Second appeal from the decree of the District Judge, Sialkot, dated the 18th November 1920.

Mr. *Ghulam Rasul*, for the Appellant.

Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—The plaintiff in this case contests a sale of 8 *kanals* 14 *marlas* of land effected by Allah Rakha, who is alleged to be his collateral in the fifth degree, in favour of Mohammad Ali. The First Court dismissed the suit, finding that it was not proved either that the land was ancestral or that the plaintiff was a collateral of the vendor, and also finding that the sale was for necessity. The District Judge differed from the First Court on all those points and passed a decree in the plaintiff's favour, allowing the alienee only a charge on the land to the extent of Rs. 220. The defendant Mohammad Ali has filed a second appeal, which we think must succeed on the ground that there are several collaterals of the vendor, more nearly related than the plaintiff, who have not impeached the sale. This plea was taken in the First Court and was made the subject of an issue. It is urged for the respondents that the plea should not be entertained because it does not appear from the judgment of the District Judge that it was raised before him. But we think that this objection carries no weight in the first place the defendant was the respondent, and not the appellant before the District Judge, and in the second place the point is not one of fact, but is purely one of law.

There are no less than six collaterals of the vendor who are descended from his great grandfather and would be entitled to succeed to his estate in preference to the

plaintiff, and the latter sent them a notice in which he said that if they did not pre-empt the land in fifteen days he would bring a suit. It is urged that they have refused, or expressed their inability to sue, and that in such circumstances, in accordance with the rule laid down in Art. 67 of Rattigan's Digest of Customary Law, a remoter reversioner is entitled to contest the alienation. But that rule, as has been held in *Budh Singh* v. *Dhan Kaur* (1) has no application to a purely speculative claim with only the remotest chance of ever having any practical effect. The present case is clearly one of a speculative nature, as the plaintiff cannot succeed to the alienor's estate until the lines of six nearer collaterals have all become extinct. We hold, therefore, that the plaintiff is not entitled to a decree, and accepting the appeal we reverse the decree of the lower Appellate Court and restore that of the Trial Court. The plaintiff will pay appellant's costs in all Courts.

S D. *Appeal accepted.*

(1) 57 P. R. 1898.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 169 OF 1924.

May 27, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

Hafiz ZAHUR AHMAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TASLIMUN NISSA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104, Sch. II, paras. 17, 19—Arbitration, reference to—Order filing agreement of reference—Arbitrators, refusal of, to act—Revocation of reference—Appeal, whether lies—Remand—Revision.

Where an order is made filing an agreement of reference to arbitration under para. 17 of Sch. II to the C. P. C., but the Court finding that the arbitrators named in the agreement are not willing to act and that it is futile to appoint new arbitrators revokes the order of reference and dismisses the suit, the order of revocation is not open to appeal. [p. 405, col. 1.]

Where, however, an appeal is preferred against such an order and the Appellate Court accepts the appeal and remands the case to the Trial Court, the order of the Appellate Court is a final order and is open to revision. [p. 405, col. 2.]

Civil revision against an order of the District Judge, Badaun, dated the 19th of August 1924.

Mr. *Iqbal Ahmad*, for the Appellants.

Mr. *S. P. Sinha*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a civil revision from an order passed in appeal by the District Judge, It appears that the parties had agreed to refer their disputes to the arbitration of two arbitrators and one umpire. There was considerable delay in the proceedings of the arbitrators, and ultimately the applicants filed an application under Sch. II, r. 17, of the C. P. C. for the filing of the agreement of reference to arbitration. Notices were issued to the defendants to show cause why the agreement should not be filed, and on the 14th of July 1923 the Court passed an order under r. 17 filing the agreement, and made an order of reference to the arbitrators appointed in accordance with the provisions of the agreement.

An appeal was preferred to the District Judge from the order filing the agreement, and owing to the pendency of the appeal there was at first some delay in the proceedings. The record was not sent to the arbitrators for sometime. It appears that subsequently the Court came to know that all the arbitrators were not willing to arbitrate, and it invited a list of the arbitrators from the plaintiffs. The arbitrators named by the plaintiffs were not acceptable to the defendants and after hearing objections by both parties the Court appointed Babu Raghubir Sahai as the sole arbitrator in the case. This order was made on the 13th of September 1923. This arbitrator did not make any award and ultimately on the 27th of September 1923 the Court appointed the Government Pleader as the sole arbitrator. The Government Pleader made an award the very next day but this award on some ground not necessary to setforth here was set aside. After this in December the Court again directed that the two arbitrators named in the agreement should be consulted as to whether they were willing to act or not with the Government Pleader as the umpire. The Court was informed that at least one of the two arbitrators was not willing to act. It then passed an order dated the 24th of October 1923 revoking the order of reference and dismissing the suit. It was against this order that an appeal was preferred to the District Judge, who has allowed it and remanded the case.

In revision two points have been urged before us. The first is that no appeal lay to the District Judge who had no jurisdiction

to interfere in the case at all, and the second is that, even if an appeal lay to him his order should not be upheld, inasmuch as the order passed by the Subordinate Judge was correct and just.

A preliminary objection was raised on behalf of the respondents that no revision lies from the order of remand passed by the District Judge. This objection cannot be entertained because the District Judge has finally disposed of the matter pending before him.

We are of opinion that this was not a case in which an appeal lay to the District Judge. The Subordinate Judge had previously passed an order filing the agreement. An appeal from that order was preferred and dismissed. The ultimate order passed by and revoking the reference and dismissing the suit would not be appealable unless it came under s. 104 of the C. P. C. Section 104 (1) (*a*) cannot apply because the order was not one superseding the arbitration where the order had not been completed within the period allowed by the Court. The fact was that the Court found that as the arbitrators named were not willing to act it was futile to appoint new arbitrators. Nor did it come under sub-cl. (*d*) because the order was not an order refusing to file an agreement to refer to arbitration. An appeal from an order superseding the agreement is limited by the provisions of s. 104 (1) (*a*) of the C. P. C. The order passed by the Subordinate Judge was, of course, not a decree and was not appealable as such.

We have, however, been invited to interfere with the order passed by the Subordinate Judge in revision. It is unnecessary in this case to decide the question whether when one of the arbitrators named in the agreement has refused to act and has died, an agreement can or cannot be filed under r. 17. The parties respectively rely on two cases of this Court. One is the case of *Bhagwan Das* v. *Gurudayal* (1) and the other is *Fazal Ilahi* v. *Prag Narain* (2). In the present case, however, the agreement was filed under r. 17. The agreement having been filed under r. 17, the provisions of r. 19 became applicable. Assuming, therefore, that r. 5 was applicable and the Court ought to have proceeded in strict accordance with the provisions of that rule it cannot be doubted that, even if the procedure adopted by the Court was irregular, the parties acquiesced in it and waived their objection. The plaintiffs themselves nominated a number of arbitrators and ultimately the Court decided to appoint one gentleman as the sole arbitrator. After that the only question was whether, if the arbitrator so appointed refused to act, the Court should not appoint another in his place. The order passed by the Court would, therefore, be an order passed under Sch. II, r. 5 (2) making an order superseding the arbitration. As there was no suit pending before it, it could not, of course, proceed with the suit. We are informed that Raza Ahmad has already instituted a suit, to which the other applicant has been made a party, to enforce his rights which were referred to arbitration under the agreement. Under these circumstances we find it difficult to set aside the order of the Subordinate Judge on the ground of irregularity which was acquiesced in, and submitted to, by all the parties.

We accordingly allow this application in revision, and, setting aside the order of the District Judge, restore the order of the Subordinate Judge. As no objection was raised before the District Judge that no appeal lay to him, we direct the parties to bear their own costs of this revision.

Daniels, J.—I concur, reason for holding that a revision lies from the order of the District Judge is this. The respondents' objection is that no revision lies because no case has yet been decided. The case had, in fact, been decided by the Subordinate Judge in a final order from which no appeal lay, and when the District Judge entertained an appeal from that order which he has no jurisdiction to entertain and set it aside his order is certainly open to revision by this Court.

Z. K. *Application allowed.*

(1) 64 Ind. Las. 459; 19 A. L. J. 823.
(2) 67 Ind. Cas. 739; 20 A. L. J. 327; (1922) A. I. R. (A.) 133; 3 U. P. L. R. (A.) 156; 44 A. 156.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1562 OF 1924.
January 7, 1925.
Present :—Mr. Justice Jai Lal.
GHULAM MUHAMMAD AND OTHERS—DEFENDANTS—APPELLANTS
versus
ABDUL SATAR AND OTHERS PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 32, 120—

Suit for injunction regarding common land—Limitation.

Plaintiff instituted a suit praying for an injunction that the defendant be restrained from cultivating a certain piece of land on the allegation that the land in dispute was a pond which, according to the custom of the village, was reserved for the use of the owners of the village including the defendant and that the defendant was not entitled to do anything so as to interfere with such common use :

Held, that the suit was governed by Art. 32 and not by Art. 120 of Sch. I to the Limitation Act.

Second appeal from a decree of the District Judge, Mianwali, dated the 1st March 1924.

Sheikh *Akbar Ali*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiffs instituted this suit on the 13th of January 1923, praying for an injunction that the defendants be restrained from cultivating *khasra* Nos. 268 and 100 paces of the surrounding land on the allegation that *khasra* No. 268 was a pond, which, according to the custom of the village, was reserved for the common use of all the owners in the village, and that no individual owner was entitled to do any thing so as to interfere with such common use. The District Judge has held that the land in dispute is a pond and has been used as such by the owners till it was encroached upon by the defendants some time after 1918, but more than two years before suit. The learned Judge has further found that according to the custom of the village the property in suit could not be converted to his own use by any one owner of the village. He has consequently upheld the decree of the Subordinate Judge. The defendants appeal to this Court.

The only ground argued before me was that of limitation. Both the lower Courts have held that the suit was instituted within the period of limitation. The question is whether the suit is governed by Art. 32 of the Indian Limitation Act or by Art. 120. In the former case it would admittedly be barred by limitation and in the latter it would be within time. The learned District Judge, following *Achar Singh* v. *Badhava Singh* (1) has held that Art. 120 is applicable and not Art. 32. In that case the suit was for ejectment from a field recorded as of a thoroughfare and *shamilat*. It does not appear whether the defendant was a proprietor of land in the village or a stranger; but, as in this case, the suit was nominally on behalf of the village community to remove an obstruction to the enjoyment of *shamilat* by the proprietors generally. The learned Chief Judge recorded the following opinion :—

"The learned Pleader for the respondent contended that Art. 32, prescribing two years' limitation from the date of the appropriation of the land in suit, applied and cited *Sharoop Dass Mondal* v. *Joggessur Roy Chowdhry* (2). As at present advised, I am inclined to hold that Art. 32 is not applicable, and that Art. 120 is applicable. Article 146-A obviously is not applicable, as the suit is not by, or on behalf of, any local authority."

On the force of these remarks the learned District Judge has held that Art. 120 applied. As I have stated above it does not appear whether or not the defendant in that case was a proprietor in the village. In the case before me the defendants are proprietors and as such are entitled to use the land in suit in common with the other proprietors. This is an important factor which has to be borne in mind in determining the Article of the Indian Limitation Act that should govern this suit. Article 32 reads as follows :—

"Against one who, having a right to use property for specific purposes perverts it to other purpose." In my opinion the Article clearly applies to the facts of the case before me. The learned Counsel for the respondents contended that this Article is intended to apply to the case of a defendant who was, before the encroachment, in actual and exclusive possession of the property for a specific purpose but subsequently perverts it to other purposes. No authority was quoted in support of this contention and I do not think the phraseology of Art. 32 supports it. The defendant-appellant had admittedly a right to use the property in dispute along with the other proprietors of the village for a specefic purpose, *i. e.*, of taking water therefrom, and have taken possession thereof by filling up the pond and cultivating the entire area, thus they have perverted it to purposes other than those for which it was intended. In my opinion

(1) 15 Ind. Cas. 285; 124 P. R. 1912; 132 P. W. R. 1912; 2 P. L. R. 1913.

(2) 26 C. 564; 3 C. W. N. 464; 13 Ind. Dec. (N. S.) 962 (F. B.).

for reasons already given *Achar Singh* v. *Badhawa Singh* (1) is distinguishable from the present case. In any case from the remarks of the learned Chief Judge quoted above it appears that he purposely refrained from expressing a definite opinion; moreover it was not really necessary for him to decide whether or not Art. 32 applied because the suit was held to be barred by limitation even under Art. 120.

I hold that Art. 32 of the Indian Limitation Act governs the present case and consequently the suit was barred by limitation.

Accepting the appeal I dismiss the suit but in peculiar circumstances, I leave the parties to bear their own costs throughout.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 86 OF 1924.

April 16, 1925.

Present:—Mr. Findlay, Officiating J. C., and Mr. Wadegaonkar, A. J. C.

CHUNILAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KISHANDAS RAMDAS—DEFENDANT—RESPONDENT.

C. P. Courts Act (I of 1917), s. 6 (2)—Rules framed by Judicial Commissioner, r. 2 (b)*—Court Fees Act (VII of 1870), s. 7* (v)*—Suits Valuation Act (VII of 1887), s. 3—Suit of value below Rs. 10,000—Appeal—Value raised above Rs. 10,000—Appeal, whether must be heard by Bench of two Judges—Practice—Valuation, increase in, retrospective effect of.*

According to r. 2 (*b*) of the rules made by the Judicial Commissioner for disposal of cases either by a Bench of Judges or by a Single Judge, two conditions are absolutely necessary in order that a first appeal filed in the Judicial Commissioner's Court may be heard and determined by a Bench of two Judges, *viz.*, the value of the subject-matter of the suit which has given rise to the appeal must be Rs. 10,000, or upwards, in the Court of first instance and the value of the subject-matter of the appeal must also be Rs. 10,000 or upwards. [p. 403, col. 1.]

Neither the C. P. Court Fees Amendment Act increasing for the purposes of Court fees the value of revenue paying estates from 5 times to 12½ times the land revenue, nor the notification issued by the C. P. Local Government in exercise of the powers conferred by s. 3 of the Suits Valuation Act increasing the value of such estates for the purpose of jurisdiction to 12½ times the revenue payable, can have a retrospective operation so as to affect the value of such estates for purposes of Court-fees or for the purposes of jurisdiction in suits previously instituted for possession of such lands. [*ibid.*]

The value of a suit remains unchanged in all stages of the *lis* and determines the *forum* of appeal. For such purpose the value assigned by the plaintiff and not the value found by the Court must be looked at unless it appears that either purposely or through gross negligence the true value of the suit has been altogether misrepresented in the plaint. [p. 403, col. 2.]

Mahabir Singh v. *Behari Lal*, 13 A. 320; A. W. N. (1891) 107; 7 Ind. Dec. (N. S.) 202, *Madho Das* v. *Ramji Patak*, 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N. S.) 186, *Olpherts* v. *Arjundas*, 20 Ind. Cas. 928; 9 N. L. R. 112 and *Dhirajsingh* v. *Rajaram*, 8 Ind. Cas. 1125; 6 N. L. R. 164, followed.

Appeal against the judgment of the Subordinate Judge, First Class, Burhanpur, dated the 28th August 1924, in Civil Suit No. 4 of 1923.

Mr. *W. R. Puranik*, for the Appellants.

Mr. *M. B. Kinkhede*, R. B., for the Respondent.

ORDER.—On 7th November 1922, plaintiffs-appellants instituted a suit against the defendant-respondent in the Court of the Subordinate Judge, Burhanpur, for possession of 15 annas 4 pies share of *Mouza* Deori situated within the jurisdiction of that Court. They valued their claim at Rs, 6,644-8-6 for purposes of Court-fees and in para. 11 of their plaint they distinctly stated that 'the value of the subject-matter of the suit for the purpose of jurisdiction is Rs. 6,644-8-0.' On 25th August 1924, their claim was dismissed by the Subordinate Judge. Against this decision, they have preferred this appeal valuing the subject-matter of the appeal which is identical with the subject-matter of the suit at Rs. 16,611-5-3 for purposes of Court-fees and jurisdiction under s. 7, para. (*v*) (*b*) of the Court Fees Act as amended by the C. P. Court Fees (Amendment) Act, 1923 and under Central Provinces Gazette Notification No. 1408/822-V, dated the 22nd July 1924, issued by the Local Government in exercise of the power conferred by s. 3 of the Suits Valuation Act (Act VII of 1887).

The learned Advocate for the defendant-respondent has taken a preliminary objection that this appeal cannot be heard by a Bench of two Judges and that it must go to a Single Judge of this Court for disposal. In support of his objection he relies on r. 2 (*b*) of the rules made by this Court in exercise of the power conferred by s. 6, sub-s. (2) of the C. P. Courts Act, 1917, and sanctioned by the Local Government (*vide* Central Provinces Gazette Notification No. 29/489-A, dated the 14th June

1917). According to that rule two conditions are necessary in order that a first appeal filed in this Court may be heard and determined by a Bench of two Judges, *viz.* (1) the value of the subject-matter of the suit which has given rise to the appeal must be Rs. 10,000 or upwards in the Court of first instance and (2) the value of the subject-matter of the appeal must also be Rs. 10,000 or upwards. Unless both the conditions referred to above are fulfilled, it is not, in our opinion, competent to a Bench of two Judges to hear and determine first appeals under that rule. In the present case, the second condition has been fulfilled but not the first. We are accordingly of opinion that this appeal must go to a Single Judge of this Court for disposal.

It is no doubt true that after the institution of the original suit which has given rise to this appeal, the Court Fees Act (VII of 1870) was amended by the C. P. Court Fees (Amendment) Act (I of 1923) whereby it was enacted that in suits for possession of land not permanently settled forming an entire estate or a definite share of an estate paying annual revenue to Government, the value of the land for purposes of Court-fees would be $12\frac{1}{2}$ times, instead of 5 times, the revenue so payable. It is also true that about 20 months after the institution of this suit, the Local Government issued a notification in exercise of the power conferred by s. 3 of the Suits Valuation Act to the effect that in suits for possession of land, like the one referred to above, the value of the land for purposes of jurisdiction would be $12\frac{1}{2}$ times the annual revenue payable for the land. But neither the C. P. Court Fees (Amendment) Act nor the aforesaid notification can have retrospective operation so as to affect the value of such land either for purposes of Court-fees or for purposes of jurisdiction in suits previously instituted for possession of such land. When the suit which has given rise to this appeal was instituted, the market-value of the land at the date of suit determined the jurisdiction of the Court. Plaintiffs had purchased 15annas 9 pies share of Deori for Rs. 9,000and they stated in para. 11 of the plaint that the market-value of that share was Rs. 6,444-8-6. It is this value which determined the jurisdiction of the Court below and it could not be affected by enactments passed and notifications issued subsequent to the date of the institution of that suit. In short, as the value of the subject-matter of the suit out of which this appeal has arisen was less than Rs. 10,000, this appeal cannot be heard by a Bench of two Judges.

In this connection, we may refer to the case of *Mahabir Singh* v. *Behari Lal* (1) in which it has been held that for the purpose of determining the proper Appellate Court in a civil suit, what is to be looked at is the value of the original suit, that is to say, 'the amount or value of the subject-matter of the suit' and that such 'amount or value of the subject-matter of the suit' must be taken to be the value assigned by the plaintiff in his pliant and not the value as found by the Court, unless it appears that. either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint. This case has been followed in *Madho Das* v. *Ramji Patak* (2) which has been cited with approval in *Olpherts* v. *Arjundas* (3) and it has been held by this Court in the latter case as well as in *Dhirajsingh* v *Rajaram* (4) that the value of a suit remains unchanged in all stages of the *lis* and determines the *forum* of appeal. We agree with this view and accordingly hold that as one of the conditions necessary for an appeal being heard by a Bench of two Judges does not exist in the present case, this appeal must go to a Single Judge of of this Court for disposal.

The learned Pleader for the appellants invites our attention to r. 3 of the rules made by this Court for the hearing of appeals by a Bench of two Judges which lays down that any appeal, reference application or other matter which the Judicial Commissioner may order to be heard and determined by a Bench of two Judges and requests that an order may be passed directing that this appeal may be heard by a Bench of Judges as it is likely that an appeal may be preferred against the decision of this Court to the Privy Council. With reference to this request all that we wish to observe is that it cannot be made to this Bench. It is open to the appellants to move the proper authority and unless they do so and obtain an order in their favour, it is not competent to this Bench to hear their appeal.

(1) 13 A. 320; A. W. N. (1891) 107; 7 Ind. Dec. (N. S.) 202.
(2) 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N. S.) 186.
(3) 20 Ind. Cas. 928; 9 N. L. R. 122.
(4) 8 Ind. Cas. 1125; 6 N. L. R. 164.

Under the peculiar circumstances of the case, we make no order as to costs of the hearing before us.

G. R. D. *Order accordingly.*
Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1816 OF 1923.
February 8, 1924.

Present :—Mr. Justice Moti Sagar.

THE FIRM STYLED AS BALLA MAL-RAKHA MAL, THROUGH RAKHA MAL —PLAINTIFFS—APPELLANTS

versus

THE FIRM KNOWN AS BUDHU MAL-PRABH DIAL, THROUGH PRABH DIAL —DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 221—Commission agent—Lien—Re-sale, right of.

Ordinarily a person entitled to a lien cannot, in order to satisfy his lien, sell or dispose of the property without the consent of the owner. [p. 410, col. 1.]

Under s. 221 of the Contract Act, the rights of a commission agent are of a limited nature and are confined to the mere right of retainer which may be used as a defence to any action for the recovery of the property brought against him or as a matter of title to reclaim the property by action, if he has been unlawfully dispossessed of it. [*ibid.*]

An agent, who has bought goods for a principal with his own money, does not stand to the principal in the position of an unpaid seller and has, therefore, no right to re-sell. [p. 410, col. 2.]

Yule & Co. v. *Mahomed Hussain*, 24 C. 124; 1 C. W. N. 71; 12 Ind. Dec. (N. S.) 748 and *Clive Jute Mills Co. Ltd.* v. *Ebrahim Arab*, 24 C. 177; 12 Ind. Dec. (N. S.) 784, relied upon.

Second appeal from a decree of the District Judge, Amritsar, dated the 7th May 1923, affirming that of the Munsif, First Class, Amritsar, dated the 21st January 1922.

Lala *Fakir Chand*, for the Appellants.

Lala *Badri Dass*, R. B., for the Respondents.

JUDGMENT.—The facts of the case which has given rise to this appeal are very simple and are shortly these.

On the 17th of November 1919 the defendants purchased a *kotha* of gram for Rs. 4,817-4-9 and paid a sum of Rs. 480 to the plaintiffs on the same date as an advance. The plaintiffs' case is that it was they who sold the *kotha* to the defendants and that the parties stood in the relation of buyer and seller to each other. The defendants deny this allegation and contend that they did not purchase any *kotha* from the plaintiffs but from some third parties and that the plaintiffs had acted only as commission agents on their behalf in this matter.

It is common ground that the *kotha* was to remain in possession of the plaintiffs and that the balance of the price was to be paid on the 1st of *Magh* 1976 corresponding to 14th January 1920 when delivery was to be taken by the defendants, it appears that the defendants neither paid the balance of the price nor took delivery on the due date though they were repeatedly asked to do so. The plaintiffs thereupon re-sold the *kotha* at the defendants' risk which resulted in a loss of Rs. 670-15-9. The plaintiffs have now brought this suit for the recovery of this loss from the defendants together with interest at the rate of Rs. 1-9-0 per cent. per annum.

The defendants plead that the plaintiffs as commission agents had no right to re-sell the *kotha* without their consent and that their (the plaintiffs') right only extended to keep the goods in their possession till their lien was satisfied. They further plead that the sale being illegal, the plaintiffs have no cause of action to maintain the suit.

Both the Courts below have concurrently found that the *kotha* had been purchased by the defendants through the agency of the plaintiffs and that the relation of buyer and seller did not exist between the parties. They further held that the plaintiffs as commission agents had no power to re-sell, and as a result of this finding have dismissed the suit.

In the second appeal it is again urged by Mr. Fakir Chand that the *kotha* had been sold by the plaintiffs to the defendants and that both the Courts below have erred in holding otherwise. It is pointed out that no commission was charged by the plaintiffs at the time of the purchase of the *kotha* and it is urged that this fact clearly indicates that the plaintiffs were not acting as commission agents for the defendants but that the parties stood in the relation of buyer and seller to each other. This question, however, has been fully considered by the learned Judge of the Court below and his finding is that the contention of the plaintiffs that they were the sellers and not acting as commission agents on behalf of the defendants has not been established. This finding, in my opinion,

is clearly a finding of fact and cannot be impugned in second appeal.

The main question to be considered is whether the plaintiffs as commission agents had or had not the right to re-sell the goods when the balance of the price had not been paid on the due date. The law on the subject is contained in s. 221 of the Indian Contract Act. That section provides that in the absence of a contract to the contrary the agent is entitled to retain goods and other property, moveable or immoveable, of the principal received by him until the amount due to himself for commission, disbursement and services in respect of the same has been paid or accounted for to him. It will be observed that under this section the rights conferred upon an agent who has a lien on the principal's property are of a very limited nature and seem to be confined to the mere right of retainer which may be used as a defence to any action for the recovery of the property brought against him or as a matter of title to re-claim the property by action, if he has been unlawfully dispossessed of it. The case would, of course, be different if there is a contract between the parties to the contrary. In the present case no such contract between the parties has been proved and no authority has been cited by Mr. Fakir Chand in support of his contention that the party entitled to a lien can ordinarily sell or dispose of the property without the consent of the owner in order to satisfy his lien. Article 76 in Bowstead on Agency, to which reference was made at the time of arguments does not, in my opinion, support the plaintiffs' contention in any way whatever. According to that Article if an agent purchases goods on behalf of his principal and becomes personally liable for the price of those goods, the property in the goods as between the principal and agent vests in the agent and does not pass to the principal until he pays for the goods. If the property in the goods does not pass to the principal until the goods have been paid for, I do not see how the agent, even as an unpaid seller, can re-sell on behalf of his principal. Under s. 107 of the Indian Contract Act an unpaid seller has a right of re-sale on the buyer's failure to perform his part of the contract only if the property in the goods had passed to the purchaser; and where property is not so passed, the vendor is not entitled to sue to recover loss incurred on re-sale, but can only sue the purchaser for damages for breach of contract [*vide Yule & Co.* v. *Mohamed Hussain* (1), *Clive Jute Mills Co. Ltd.* v. *Ebrahim Arab* (2).] I am supported in this view also by an unpublished judgment of this Court in the case of *Harbhajan Singh* v. *Ghasita Mal* (Civil Appeal No. 1264 of 1918) in which it was held that an agent, who has bought goods for a principal with his own money, does not stand to the principal in the position of an unpaid seller and has, therefore, no right to re-sell. In this view of the law the decision arrived at by the learned Judges of the Courts below is correct and the appeal must necessarily fail.

I accordingly dismiss the appeal with costs.

S. D. *Appeal dismissed.*

(1) 24 C. 124; 1 C. W. N. 71; 12 Ind. Dec. (N. S.) 748.
(2) 24 C. 177; 12 Ind. Dec. (N. S.) 784.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1339 OF 1923.

June 17, 1925.

Present:—Mr. Justice Sulaiman.

Lala BABU RAM—DEFENDANT—APPELLANT

versus

RAM SARUP—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 100—Agreement to hypothecate future crops—Charge—Transferee of crops without notice, whether bound—Notice, express, whether necessary.

An agreement to hpyothecate future crops when they come into existence is valid and as soon as the crops grow, the hypothecation becomes complete and attaches to the crops and creates an equitable interest in the mortgagee. Such a charge can be enforced against all subsequent transferees with notice but is of no avail against a transferee without notice, and inasmuch as cut crops cannot be easily identified and a person to whom they are transferred would not necessarily know that they are the very crops which had been previously mortgaged to any other person, proof of express notice would be necessary in order that the charge may be enforced against such a person. [P. 411, col 2.]

Misri Lal v. *Mozhar Hossain*, 13 C. 262; 6 Ind. Dec. (N. S.) 674 and *Bansidhar* v. *Sant Lal*, 10 A. 133; A. W. N. (1888) 35; 6 Ind. Dec. (N. S.) 90, relied on.

Second appeal against a decree of the District Judge, Pilibhit, dated the 11th August 1923.

Mr. *G. Agarwala*, for the Appellant.

Mr. *U. S Bajpai*, for the Respondents.

JUDGMENT.—This is an appeal by defendant No. 2 arising out of a suit brought on the basis of a registered deed dated the

25th of October 1921 executed by the defendant No. 1 in favour of the plaintiff. Under this deed a grove and the sugarcane crops on 10 *bighas* of land were hypothecated. The defendant No. 2 was impleaded on the ground that he had taken possession of the crops and crushed them. In the plaint the plaintiff sought no relief against the grove of the mortgagor but stated that a separate suit would be filed later if necessary.

The defendant No. 2 denied the allegations of the plaintiff in general but the specific pleas taken by him were that he had not crushed the crops at all and that he was not in law liable to the plaintiff's claim.

The Court of first instance framed three issues :—(1) as to the execution of the bond in suit, (2) as to whether sugarcane crops were pressed at the pressing machine of the defendant No. 2, and (3) as to the effect of the release of the grove by the plaintiff. It found the execution proved but found that it was not established that the sugarcane crops had been pressed at the appellant's pressing machine. It, therefore, considered it unnecessary to decide the third issue and decreed the claim as against defendant No. 1 only and exempted defendant No. 2. On appeal the learned District Judge has granted the plaintiff a decree for Rs. 200 against defendant No. 2 also.

It is unfortunate that the issues that were framed were not happily worded. The question was not merely whether the sugarcane crops had been pressed at the pressing machine of the defendant No. 2 but the question was whether the defendant No 2 had appropriated the crops or in any other way deprived the plaintiff of the use of the crops. The learned Vakil for the appellant contends that the finding of the learned Judge that the crops were pressed at the defendant's machine is not sufficient because it may very well be that after they were pressed the sugarcane juice was taken back by the mortgagor. I think, however, that although the issue was not happily worded it was understood by both parties that a finding that the crops were crushed at the defendant's press would amount to a finding that they were appropriated by him. This is manifest from the fact that the mortgagor is a cultivator in sugarcane crop and the defendant is a person who presses sugarcane crop. There is, therefore, no force in this contention.

It is next contended that the learned Judge should not have passed a decree without recording a finding that the defendant had notice of the mortgage. There can be, no doubt, that under s. 3 of the Transfer of Property Act growing crops are not immoveable property, and, therefore, that Act does not apply to this case. Further when the mortgage was made these crops were not in existence. The deed originally amounted to a mere agreement to hypothecate the further crops when they do come into existence. Such an agreement was valid, as was pointed out by the Calcutta High Court in the case of *Misri Lal* v. *Mazhar Hossain* (1). But as soon as the crops grew, the hypothecation became complete and attached to the crops and created an equitable interest in the mortgagee. Such a charge could be enforced against all subsequent transferees with notice but would be of no avail agaiust a transferee without notice. This was clearly laid down by a Bench of this Court in the case of *Bansidhar* v. *Sant Lal* (2) which has been followed since in several cases. Furthermore, ordinarily speaking, cut crops cannot be easily identified and a person who presses them does not necessarily know that they are the very crops which had been previously mortgaged to any other person. In such cases proof of express notice would certainly be necessary. As there was no finding by the District Judge I have instead of remanding an issue examined the record. I have already mentioned that in the written statement the defendant No. 2 never took the plea that he was a *bona fide* transferee for value without notice or that he had pressed the crops in good faith or returned the juice to the mortgagor. His *mukhtar am* Ram Gopal was produced on his behalf who stated that on receipt of a notice from the plaintiff that Pershadi's crops were mortgaged to him his master did not press the crops at his machine. It is obvious, therefore, that the only question that remained after that statement was whether the crops had or had not been pressed. The notice of the mortgage was admitted on behalf of the defendant. This explains the absence of any issue or finding by the Courts below.

Under these circumstances I uphold the decree of the learned Judge and dismiss this appeal with costs including fees on the higher scale.

Z K. *Appeal dismissed.*

(1) 13 C. 262; 6 Ind. Dec. (N. S.) 674.

(2) 10 A. 133; A. W. N. (1888) 35; 6 Ind Dec. (N. S.) 90.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 203 OF 1924.

March 25, 1925.

Present :—Mr. Daniels, A. J. C.

ASHIQ ALI—PLAINTIFF—APPELLANT

versus

GHULAM SARWAR—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 5—Heritable and non-transferable tenancy right, nature of—Occupancy land—Sale in favour of landlord, validity of.

A sale of occupancy land in favour of the landlord is perfectly legal.

Binda Prasad v. *Rajendra Prasad*, 10 O. C. 235 and *Hirday Behari* v. *Prag Tiwari*, 11 Ind. Cas. 527; 14 O. C. 144, followed.

A grant of a heritable and non-transferable tenancy right might be described as a right of occupancy but does not convert the land into occupancy land within the meaning of s. 5 of the Oudh Rent Act.

Second appeal against a decree of the Sub-Judge, dated the 27th February 1924, confirming that of the Munsif, Fatehpore, dated the 4th of December 1924.

JUDGMENT.—This was a suit for possession of plot No. 79/1 in the village of Husainmau in the Bara Banki District. The plaintiff-appellant executed a sale-deed in favour of the defendant of certain land including this plot for a sum of Rs. 200 in order to provide funds for certain litigation. The defendant is in possession of the land and his title is based on this sale-deed. The money was left with the defendant to spend in the litigation as it might be required. A suit was duly filed by the parties jointly, but in the course of the litigation the defendant withdrew from the case and a compromise was filed between the present plaintiff and the defendant to that suit. The plaintiff's case is that by reason of the defendant having withdrawn from the suit contrary to his bargain the sale-deed has become null and void. Both the Courts below have found as a fact that the defendant withdrew from the suit with the consent of the plaintiff because the defendants in that suit were on bad terms with the present defendant Ghulam Sarwar and refused to compromise as long as he was a party to it. It is impossible for the appellant to argue that this finding is not based on legal evidence, inasmuch as it is based on an admission by the plaintiff himself made in the course of the mutation proceedings. This disposes of the case on the merits. The other points urged in this appeal are that the sale-deed did not confer any present right on the defendant and was, therefore, void, and secondly, that as the defendant originally argued that the land was occupancy land it is not open to him now to take a contrary position. I have read the sale-deed and it is perfectly clear from its terms that it does purport to convey to the defendant a present right to a half share of the property. As regards the second point the Courts below have held that the land is not occupancy land within the meaning of s. 5 of the Oudh Rent Act but that it was acquired under the terms of a deed which gave a heritable non-transferable right which might be described as a right of occupancy. This was the finding of the Revenue Courts and the matter was within the special jurisdiction of those Courts. The learned Subordinate Judge has further held on the basis of the rulings of this Court in *Binda Prasad* v. *Rajendra Prasad* (1) and *Hirday Behari* v. *Prag Tiwari* (2), that even if the land was occupancy land the present sale was effected in favour of the landlord and is, therefore, not illegal. The appellant is not in a position to contest these rulings but he argues that there is some sort of estoppel because when the case was first instituted the defendant contended that it was not cognizable by the Civil Court on the ground that the land was occupancy land. If the Civil Courts had refused to entertain the suit, and referred it to the Revenue Court on the ground that the latter alone had jurisdiction there might be something to be said for the appellant's position. It might then be said that the defendant having succeeded in one Court on the ground that the land was occupancy land could not turn round when the case was brought in another Court and dispute the jurisdiction of that Court. Here, however, the case was not decided on this ground at all. The case after being decided by the Courts below on the ground of want of jurisdiction came to this Court which remanded it for disposal on the merits without arriving at any decision as to whether the land was occupancy land or not. Under these circumstances no question of estoppel arises. The appeal fails on all the grounds urged and I dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 10 O. C. 235.
(2) 11 Ind. Cas. 527; 14 O. C. 144.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 249 OF 1924.

May 2, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

JETHALAL MOHANJI—PLAINTIFF

versus

DAYABHAI RAMJI AND ANOTHER —DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of, principles governing—Property in possession of opposite party—Discretion of Court.

A Receiver will not be appointed under O. XL, r. 1, C. P. C., unless the plaintiff satisfies the Court that he has a *prima facie* case and that an order for the appointment of a Receiver is necessary for the protection of the property pending litigation. In appointing a Receiver of property which is in the possession of the opposite party the Court will act with caution and exercise a discretion to be governed by all the circumstances of the case. [p. 413, col. 2.]

Owen v. *Homan*, (1853) 4 H. L. C. 997 at p. 1032; 17 Jur. 861; 1 Eq. Rep. 370; 10 E. R. 752; 94 R. R. 516, relied upon.

Mr. *Kimatrai Bhojraj*, for the Plaintiff.

Mr. *Dipchand Chandumal*, for the Defendants.

ORDER.—This is an application for the appointment of a Receiver in a partition suit. The plaintiff is the nephew of the defendants. He claims an equal share with them in certain property alleged to be joint family property and said to consist of immoveable property valued at Rs. 30,000 ornaments and house-hold effects valued at Rs. 10,000, stocking-trade and cash each valued at Rs. 5,000.

The defendant No. 1 has filed an affidavit denying the plaintiff's claim. He has asserted that Ramji, the father of the defendants and grandfather of the plaintiff died penniless about nineteen years ago; that the plaintiff's father Mohanji predeceased him, the plaintiff being a posthumous son of Mohanji that he himself started and developed the business which is now alleged by the plaintiff to be the joint family business without the aid of joint family funds, and that the property which is now in his possession and the possession of defendant No. 2 has been acquired by them on their own account after the death of Ramji and Mohanji. He asserts that he maintained the plaintiff out of charity and permitted him to work as an apprentice in the business, the plaintiff having thereby acquired no rights in the property in suit. He has further produced two deeds of release executed in favour fo the defendants by their two other brothers Doso and Premji who are not parties to the suit, declaring that the property in the possession of the defendants belongs to them and that Doso had accepted Rs. 1,700 and Premji Rs. 1,000 in lieu of their remuneration for working at the shop of the defendants. On the other hand it is contended on behalf of the plaintiff that the business which has resulted in the acquisition of the property in suit was started and built up by his father Mohanji and subsequently carried on by the defendants for the benefit of the joint family consisting of himself and the defendants; that the property which was subsequently acquired has been acquired out of the profits of this business to which he has contributed himself personally by working at the shop for seven or eight years. The plaintiff is now about 20 years old. Reliance has also been placed on a writing said to be a reference to arbitration in which the defendants are alleged to have admitted the claim of the plaintiff to the property in suit. The translation of this document as supplied by the plaintiff's Pleaders and the circumstances under which it was signed are again the bone of contention between the parties.

It is well-settled that a Receiver of the property will not be appointed under O. XL, r. 1, C. P. C., unless the plaintiff satisfies the Court that he has a *prima facie* case, and that an order for a Receiver is necessary for the protection of the property pending litigation. It is further well settled that in appointing a Receiver of property which is in the possession of the opposite party the Court will act with caution and exercise a discretion to be governed by all the circumstances of the case. As observed by Lord Cranworth in *Owen* v. *Howan* (1) remarks at page 1032 :—

"The Receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation which is to decide the rights of the litigant parties. In such cases the Court must, of necessity, exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of *interim* protection of the

(1) (1853) 4 H. L. C. 997 at p. 1032; 17 Jur. 861; 1 Eq. Rep. 370; 10 E. R. 752; 94 R. R. 516.

property. Where indeed the property is as it were *in madio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble.....But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the Court interferes by appointing a Receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case."

What then are the circumstances of the present case? The plaintiff is admittedly out of possession of the property. His claim to a share is denied and it has yet to be proved. There has been a disruption of the joint family tie, two of the five sons of Ramji are separate and have passed deeds of release recognizing the claim of the defendants to the property in suit. The defendants have carried on the alleged joint family business in the name of defendant No. 1 for the past twenty years and it has flourished under their management. The immoveable property is admittedly worth more than the third share claimed by the plaintiff. Pending this suit it cannot be alienated so as to affect his claim, if any. The business carried on by the defendants is grocery business. The plaintiff has not asked for a Receiver for carrying on this business but for a Receiver for taking possession of the stock in trade. The forced sale of such stock can only result in an unnecessary loss to the estate. Its retention pending the disposal of the suit would mean its total destruction. It is also neither feasible nor proper to hold an inquiry at this stage as to the cash or the ornaments or the house-hold effects which are said to be joint family property, or to order the same being handed over to the Receiver. The only ground urged by the plaintiff in support of his application is that in order to spite him the defendants are tampering with and destroying account books, and with the same object are removing and concealing the joint family property lying in the house and in the shop. Both these allegations are unfounded. Moreover the books have now been produced in Court and returned to the defendants after being marked and sealed, and cannot now be tampered with or destroyed, the defendants having undertaken to produce them in Court whenever required. The alleged family property which the defendants are charged with removing or selling is in value less than the immoveable property which can at any rate be made liable for the share of the plaintiff and the plaintiff runs the risk of losing his share in the whole estate. Without in any way prejudging the case of either side on the merits, I think this is a fit case in which I should refuse to exercise my discretionery powers. I discharge this Rule with costs.

P. B. A. *Rule discharged.*
Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2634 OF 1921.
May 17, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Malan.

MOHAMMAD AKRAM—DEFENDANT—APPELLANT
versus
MULA SINGH—PLAINTIFF AND SUNDER SINGH—DEFENDANT—RESPONDENTS.

Specific performance—Vendor and purchaser—Sale-deed executed but lost or fraudulently suppressed by one party—Court, whether can order execution of fresh sale-deed.

If in pursuance of a contract to sell a sale-deed is executed but before its registration it is removed from the control of one of the parties to the transaction by loss or fraudulent suppression on the part of the other party, on a suit for specific performance the Court can order the execution of a fresh deed of sale.

Chinna Krishna Reddi v. *Dorasami Reddi*, 20 M. 19; 7 Ind. Dec. (N. S.) 13, *Nallappa Reddi* v. *Ramalingachi Reddi*, 20 M. 250; 7 Ind. Dec. (N. S.) 178 and *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Ghosh*, 8 Ind. Cas. 794; 12 C. L. J. 464, relied upon.

Venkatasami v. *Kristayya*, 16 M. 341; 3 M L. J. 169; 5 Ind. Dec. (N. S.) 945, distinguished.

Second appeal from the decree of the District Judge, Lahore, dated the 9th May 1921.

Sheikh *Niaz Muhammad*, for the Appellant.

Lala *Amar Nath Chopra*, for the Respondents.

JUDGMENT.—Haji Mohammad Akram defendant No. 1 bought certain land from one Makhan Singh on 4th October 1917. Mula Singh plaintiff, sued for pre-emption. The case was compromised, defendant No. 1 agreeing to sell two-thirds of the land to plaintiff and one-third to his brother, defendant No. 2 for Rs. 1,400. Defendant No. 1 agreed to cut the crop within three months and have a sale-deed registered. A sale-deed was executed but not registered. Plaintiff then sued for speciffc performance of the contract. The Trial Court dismissed the suit. The District Judge, on appeal, gave plaintiff a decree for two-thirds of the land by specific performance of the contract, on payment of two-thirds of the price—Rs. 300 had already been deposited by Mula Singh, and Rs. 633 5-4 were still due from him.

Defendant No. 1 has come up on second appeal. His Counsel relies on *Venkatasami* v. *Kristayya* (1) as authority for holding that, as a deed has already been executed, defendant No. 1 cannot be compelled to execute another deed. In that ruling, however, the non-registration of the executed document was due to plaintiff's inaction. Later rulings, *e.g.*, *Chinna Krishna Reddi* v. *Dorasami Reddi* (2), *Nallappa Reddi* v. *Ramalingachi Reddi* (3) and *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Ghosh* (4) are authority for holding that a fresh deed can be ordered to be executed, if the original deed is for any reason, removed from plaintiff's control, *e. g.*, by loss or fraudulent suppression on the part of defendant. In the present case plaintiff did his best to have the contract completed. The mere execution of the deed was not a full compliance with the admitted terms of the agreement between the parties, as an unregistered deed of sale could not operate to transfer the land to the vendee. The original deed is actually on the record of a criminal case under s. 420, Indian Penal Code, instituted by plaintiff against defendant No. 1. In a summary enquiry under s. 202, Cr. C. P., the Criminal Court had the deed produced by the Counsel of defendant No. 1. The complaint was then dismissed under s. 203, Cr. P. C., plaintiff being referred to the Civil Courts. In the circumstances it was clearly impossible for plaintiff to obtain possession of the deed in order to have it registered compulsorily within the period of limitation.

Counsel for appellant argued that the lower Appellate Court gave no findings on Issue No. 5 framed by the Trial Court, as to whether plaintiff has lost his rights by reason of a breach of the agreement. We are, however, satisfied that time was not of the essence of the contract, as ruled in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (5) and that the lower Appellate Court has rightly held that the breach of contract was committed by defendant No. 1 and not by plaintiff. There is, therefore, no ground for a remand for a more definite finding on Issue No. 5.

The appeal is accordingly dismissed with costs in favour of plaintiff.

S. D. *Appeal dismissed.*

(1) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945.
(2) 20 M. 19; 7 Ind. Dec. (N. S.) 13.
(3) 20 M. 250; 7 Ind. Dec. (N. S.) 178.
(4) 8 Ind. Cas. 794; 12 C. L. J. 464.
(5) 32 Ind. Cas. 246; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 40 B. 289; 43 I. A. 26 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1376 OF 1924.

May 1, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

AMAR SINGH—DECREE-HOLDER—APPELLANT

versus

Musammat RAM DEI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Limitation Act (IX of 1908), s. 20, Sch. I, Art. 181—Execution of decree—Payment by judgment-debtor—Certification, application for, subsequent to date of payment—Certification, effect of—Part-payment—Extension of limitation.

An application made by a decree-holder to certify a payment made by the judgment-debtor if made within three years of the date of the payment cannot be dismissed on the ground that it is barred by time. A certification made on such an application is a valid certification and if it is proved that the payment which has been certified was actually made by the judgment-debtor, any effect which the payment may have by reason of the provisions of s. 20 of the Limitation Act to extend the period of limitation for execution of

the decree will be the effect of a payment made on the actual date of the payment and not as if it was made on the date of the certification. [p. 417, col. 2; p. 418, col. 1.]

Case-law referred to.

Execution Second Appeal from a decree of the Additional Judge, Saharanpur, dated the 6th August 1924.

Mr. *S. A. Haidar*, for the Appellant.

Mr. *K. C. Mital*, for the Respondent.

JUDGMENT.—In this case on the 10th of April, 1920, the decree-holder obtained a final decree for Rs. 2,338 on a mortgage. On the 6th of April, 1923, the decree-holder is said to have received Rs. 50 from the judgment-debtor towards satisfaction of the decree. On the 3rd of July, 1923, the decree-holder applied under O. XXI, r. 2 certifying the payment of Rs. 50, and this was duly recorded by the Court. On the 19th of September, 1923, the decree-holder applied for execution. Without issuing notice to the judgment-debtor the first Court summarily rejected the application as barred by limitation. It will be seen that the date of the alleged payment of Rs. 50 was a few days within the period of limitation, whereas the certificate was some three months after the period of three years from the date of the decree had expired. The First Court then held that the application for execution was barred by limitation in that payment was certified under O. XXI, r. 2 after the period of three years from the date of the decree, and that the "certification cannot revive the decree." The lower Appellate Court relying upon the case reported as *Bhajan Lal* v. *Chede Lal* (1) dismissed the appeal.

The question for final decision in the case will be whether the application for execution was barred by limitation and the preliminary questions that we have to decide may be stated as follow:—(1) "Assuming that a payment has been made within three years of the last starting point of limitation for the execution application, (in this case the date of the final decree) must that payment, in order to avoid exclusion from recognition by the terms of O. XXI, r. 2 (3), be certified under r. 2 within any particular period of limitation? (2) If the answer is in the affirmative, (*a*) does the period of limitation for the certification commence from the last starting point for the execution application or from the date of the payment? and (*b*) was the certification within the period? (3) If the certification was not barred by any rule of limitation, does the certification make the payment entitled to recognition as a payment made on the date on which it was actually made or as a payment made on the date when it was certified?"

We have endeavoured to state these questions in unmistakeable terms because it appears to us that the ruling of this Court by which the lower appellate Court has considered itself bound has been misunderstood not only by that Court, but that that case and others of this Court to which we shall refer have been misappreciated in several subsequent cases of other High Courts.

It is necessary to be clear that there are two distinct aspects of the Law of Limitation to be distinguished, namely, the Law of Limitation, if any, applicable to the certification of a payment and the Law of Limitation applicable to an application for execution. We shall have at present to discuss only the Law of Limitation, if any, applicable to certification. If we find that there is no impediment in the way of certification, the materials before us are not complete for a decision as to whether the application for execution is within the period of limitation applicable to applications for execution. The case will for that purpose, should the necessity arise, have to be remanded for findings as to whether a payment was in fact made; if so, on what date, and was the payment, if made, such as to constitute within the meaning of s. 20 of the Limitation Act a fresh starting point for limitation so as to make the present application for execution within time. At present the only finding by the lower Courts has been that the certification could not be made.

We have been referred to several cases of this Court: *Gokal Chand* v. *Bhika* (2), *Bhajan Lal* v. *Chede Lal* (1), *Chattar Singh* v. *Amir Singh* (3) and *Baij Nath* v. *Panna Lal* (4). We do not consider that any of these cases are material to the point that we have to decide. The certification set up and the validity of which is questioned may be prior to, contemporaneous with and part of, or subsequent to the application for execution. In the case before us

(1) 24 Ind. Cas. 215; 12 A. L. J. 825.

(2) 23 Ind. Cas. 753; 12 A. L. J. 387.

(3) 32 Ind. Cas. 590; 38 A. 204; 14 A. L. J. 132.

(4) 83 Ind. Cas. 737; 22 A. L. J. 581; 46 A. 635; (1924) A. I. R. (A.) 706; L. R. 5 A. 348 Civ.

it was prior, in the cases to which we have just referred it was contemporaneous, and in *Shafi Mahomed* v. *Choitram* (5), it was subsequent. It is clear that there is a difference between the practice in this Court and that of some other Courts, including that of Calcutta, in the matter of whether an application under O. XXI, r. 2 (1) must be made by a separate and prior proceeding to an application for execution, or whether it can form part of and be contemporaneous with the application for execution, and whether the manner of making it must be in any particular form. We are not concerned here with this difference in practice. It is clear that in the present case application under O. XXI, r. 2 (1) was made by a distinct and prior proceeding. All that was held in the cases of this Court, to which we have referred, was that because there was no prior and separate proceeding, there was in fact no certificate such as is required. The question therefore, of limitation did not really arise at all. On the other hand we have on behalf of the appellant also been referred to *Jotindra Kumar Dass* v. *Gagan Chandra Pal* (6), *Pandurang Balkrishna* v. *Jagya Bhan* (7) and *Masilamani Mudaliar* v. *Sethuswami Aiyar* (8). The case of *Masilamani Mudaliar* v. *Sethuswami Aiyar* (8) has no bearing on the question before us. The Court decided merely that a contemporaneous certifying was a good certification within O. XXI, r. 2 (1) and remanded the case for a finding as to whether a payment had in fact been made; and, if so, whether it operated to save limitation. The finding on remand was that no payment had been made and that concluded the matter. Very similar was the case of *Pandurang Balkrishna* v. *Jagya Bhan* (7).

The case reported as *Jotindra Kumar Dass* v. *Gagan Chandra Pal* (6) is, however, directly in point and in favour of the decree-holder. It was held that the alleged payment being within three years of the date of the decree and the application under O. XXI, r. 2 (1) being again within three years from the date of payment the decree-holder would have a fresh starting point for limitation. The case was, therefore, remanded for evidence to be taken as to the payment. To the same effect is the case reported as *Ragam Aiyar* v. *Anantharatnam Aiyar* (9).

On behalf of the respondent reliance was placed without any justification on *Narsoomal* v. *Tirthamal* (10). We say "without justification" for though the case is in respondent's favour the two learned Judges who decided it themselves repudiated it later in the case reported as *Shafi Mahomed* v. *Choitram* (5). We have no hesitation in holding that the certifying of the payment before the application for execution sufficed to remove the bar contained in O. XXI, r. 2 (3) and to make it necessary for the Trial Court to take evidence in regard to the payment, if it was denied, and, if it was admitted or denied and proved, to determine the effect of such payment in view of s. 20 of the Limitation Act. It is clear at least that there is no provision that the payment must be certified on the day that it is made. Is there any provision that it must be certified within any particular period? The only possible limitation to be found is in Art. 181 of the Limitation Act. It is not necessary for the purposes of this case to determine whether or not that Article is applicable, for, even if it is applicable, the certifying was in this case within three years of the payment. If then the certification was not barred by any period of limitation, what is to be the effect of such certification? Sub-rule (3) of r. 2. O. XXI merely declares that the payment shall not be recognized until it has been certified. That is merely a rule of procedure, and the contrary proposition may reasonably be inferred that when the payment has been certified, it can be recognized. If it can be recognized, is it to be recognized as having been made on the day on which it was certified? We think that the former is clearly the correct proposition. If the date of payment and the date of certifying were both dates within a period of three years from the last starting point of limitation, in this case the date of the final decree, it appears to us that it could not be reasonably suggested that the Court in subsequently executing the decree would consider the date of payment to be not that on which the actual payment was made, but the date on which the actual payment was certified.

(5) 52 Ind. Cas. 804; 13 S. L. R. 37.
(6) 45 Ind. Cas. 903; 46 C. 22.
(7) 59 Ind. Cas. 399; 45 B. 91; 22 Bom. L. R. 1120.
(8) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115.
(9) 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 475; (1916) 1 M. W. N. 127.
(10) 30 Ind. Cas. 51; 9 S. L. R. 27.

If that rule would apply, as we think it must be applied where both the payment and the certificate were within a period of three years from the date of the last starting point of limitation, there appears to be no possible reason for holding that some different rule should apply where the date of certifying was beyond the period of three years from the date of the last starting point of limitation.

We hold, therefore, that assuming that the alleged payment was made on April 6th, 1923, a certification of that payment on July 3rd, 1923, is not barred by any Law of Limitation; that the certification was, therefore, a valid certification; and that, assuming the payment to have been made on April 6th, 1923, any effect which it may have by reason of s. 20 of the Limitation Act will be the effect of a payment made on April 6th, 1923 and not as if made on the date of certification, July 3rd, 1923.

The result is, that we set aside the orders of the Courts below, and direct the Subordinate Judge to restore the case to its original number, to take the evidence as to whether the payment was in fact made and to decide the case according to law. The costs of this appeal will be costs in the cause with Counsel's fees on the higher scale.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 14 OF 1925.

March 30, 1925.

Present :—Mr. Justice Daniels.

Musammat AISHA—PLAINTIFF—APPLICANT

versus

Musammat CHATTA AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XVII, r. 2—Plaintiff's evidence recorded—Adjournment—Failure of plaintiff to appear—Dismissal of suit for default, validity of—Procedure.

The words "or make such other order as it thinks fit" in r. 2 of O. XVII of the C. P. C. do not include a decision on the merits. [p. 419, col. 1.]

Where after the plaintiff's evidence has been recorded the plaintiff fails to appear on the date of an adjourned hearing, the Court is not bound to decide the suit on the merits and is entitled to dismiss it in default under r. 2 of O. XVII of the C. P. C. read with r. 8 of O. IX of the Code. [*ibid.*]

Revision against an order of the Subordinate Judge, Partabgarh, dated the 15th October 1924, confirming that of the Munsif, Kunda at Partabgarh, dated the 4th August 1924.

Mr. *Radha Krishna*, for the Applicant.

Mr. *Wasi Hasan*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an appellate order refusing to restore a case dismissed for default, Suit No. 303 of 1923 in the Court of the Munsif of Kunda at Partabgarh. Evidence had been heard on 2nd April and 7th and 12th May 1924. On 12th May the plaintiff closed her case and the hearing of the defendant's evidence was begun. The case was then adjourned till next day for the remainder of the evidence. Next day the plaintiff and her Pleader were both absent and the Munsif dismissed the suit under O. IX, r. 8 read with O. XVII, r. 2, C. P. C. An application was subsequently made to him to restore the case on the ground that the plaintiff had become insane between 12th and 13th May and that her Pleader had left the Court without ascertaining that the case was to be continued next day. The Munsif did not believe the allegation regarding the plaintiff but thought that her absence was probably a manoeuvre intended to put difficulties in the way of the defendant, who was a resident of Allahabad, who had been put to considerable expense in the matter of summoning witnesses, and whose witnesses might quite possibly fail to attend on the adjourned date. The learned Subordinate Judge also was not satisfied of the plaintiff's insanity and dismissed the appeal.

As this is a revision I must accept the findings of fact of the Courts below. The only substantial plea taken in the revision is thus stated in the ground of revision

"Because the Courts below failed to see that the case fell under O. XVII, r 2, C. P. C. and acted illegally in dismissing the suit and not proceeding to decide it on the merits."

This plea is inaccurate in fact. The Courts below did act under O. XVII, r. 2 which provides that "the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX, or make such other order as it thinks fit."

Rule 3 did not apply because time had not been granted to the plaintiff. The case

was adjourned in the ordinary way because the evidence had not been completed when the Court rose for the day. The real contention of the applicant is that O. IX, r. 8 ought not to be applied where the plaintiff's evidence was already on the record, and that the Court should have proceeded to hear the defendant's evidence and to dispose of the case on the materials before it. In support of this he relies on an unreported Bombay case decided under the Code of 1882 in which it was held that s. 108 corresponding to O. IX, r. 8, did not apply if the plaintiff's evidence was already on the record. Order IX, r. 8, might not of itself apply to an adjourned hearing, but it is made applicable to it by O. XVII, r. 2. Direct authority against the applicant's contention is contained in *Phul Koer* v. *Hashmat Ullah Khan* (1), which lays down that the words "or make such other order as it thinks fit" do not include a decision on the merits. Even if this is too narrow an interpretation it was certainly within the competence of the Court to dismiss the suit for default, and it cannot be said that in doing so the Court acted with material irregularity in the exercise of its jurisdiction. I, therefore, reject the application for revision, though under the circumstances I make no order as to costs.

Z K. *Application rejected.*

(1) 29 Ind. Cas. 553; 37 A. 460; 13 A. L. J. 679.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 190 B OF 1924.

April 22, 1925.

Present:—Mr Wadegaonkar, A.J.C.

MAHOMED GALIF—DEFENDANT—APPLICANT

versus

Syed ABDUL RAHIM, RECEIVER FOR INSOLVENT ABDUL KARIM—PLAINTIFF—NON APPLICANT.

Civil Procedure Code (Act V of 1908), s. 149, O. VII, r. 11—Suit filed on insufficient Court-fee within limitation—Deficiency made up after limitation—Suit, whether barred—Extension of time whether can be granted before registration of plaint—Discretion of Court—Revision, interference in—Provincial Insolvency Act (V of 1920), s. 59—Receiver—Institution of suit on behalf of insolvent—Leave of Court, absence of, effect of—Leave, whether must be in writing.

Where a plaint is presented on paper insufficiently stamped within the prescribed period of limitation and time is given by the Court to the plaintiff to make good the deficiency, which is supplied within the time allowed by the Court, but after the expiry of the period of limitation, the suit is not barred. [p. 420, col. 2.]

Gavaranga Sahu v. *Botokrishna Patro*, 4 Ind. Cas 503; 32 M. 305; 6 M. L. T. 129, followed.

The Court has power under s. 149 of the C. P. C. to grant time for payment of the deficient Court-fees at any time, either before or after the registration of the plaint and even after the expiry of the prescribed period of limitation. [*ibid.*]

The propriety of the discretion exercised by the Court under that section cannot be challenged in revision. [p. 420, col. 2]

The permission granted to a Receiver appointed under the Provincial Insolvency Act by the Insolvency Court, for the institution of suits on behalf of the insolvent need not be in writing. [p. 421, col. 1.]

The mere fact that the Receiver has not obtained the permission of the Insolvency Court to institute a suit is not fatal to the suit, as the obtaining of such leave is a matter between the Receiver and the Insolvency Court whose officer he is and cannot be pleaded as a valid defence by a third person to that suit. [*ibid.*]

Laduram Nathmull v. *Nandalal Karuri*, 55 Ind. Cas. 747; 47 C. 555 at p. 557; 31 C. L. J. 150 and *In re Branson*, (1914) 2 K. B. 701; 83 L. J. K. B. 1316; 110 L. T. 940; 21 Manson 160; 58 S. J. 416, relied on.

Revision against the judgment of the Judge Small Cause Court, Malkapur, dated the 16th August 1924, in Small Cause Suit No. 369 of 1924.

Mr. *G. R. Deo*, for the Applicant.

Messrs. *A. V. Khare* and *W. B. Pendharkar*, for the Non-Applicant.

ORDER.—Defendant, Mahomed Galif, executed a bond for Rs. 195 in favour of Abdul Karim on 22nd January 1921. After the date of execution of this bond Abdul Karim was adjudged insolvent and a Receiver was appointed to administer his estate. The Receiver brought a suit for recovery of Rs. 390 due on the aforesaid bond on 24th March 1924. As the plaint was not sufficiently stamped and was not signed by the Receiver himself but by his agent, it was returned "for doing the needful" and the case was fixed for 31st March 1924. As the plaint was not returned duly signed and deficient Court fee was not paid on 31st March 1924 the Court granted extension until 9th April 1924. On 9th April 1924 the plaint was returned to the Court duly signed by the Receiver and deficient Court-fee was also paid on that date. Thereupon the plaint was registered and summons was ordered to be issued to the defendant for final disposal for 20th June 1924. On 20th June 1924 defendant's statement was recorded. He ad-

mitted execution of the deed sued upon but pleaded that he received one watch worth annas 10 to 15 and two *attar* bottles worth annas 10 from Abdul Karim towards the consideration of the bond, but had not received the balance of the consideration. He further pleaded that he was a minor when he executed the bond in suit and that consequently the bond could not be enforced against him. He did not, however, adduce any evidence in proof of his pleas and prayed for time to summon witnesses. The Small Cause Court, Malkapur, granted his prayer and fixed the case for evidence for 6th August 1924. On 6th August 1924 that Court after recording the evidence of the witness summoned by the defendant decreed the claim against him. He has now come up in revision.

It is urged that the Court below should have granted further extension of time to the defendant to enable him to produce a certified copy of the birth register maintained at Chandur to show on what date he was born. With reference to this contention I may point out that there is nothing on record to show that the defendant asked for further extension of time. But even assuming that he applied for further extension and the Court refused to grant it, I am of opinion that it was perfectly justified in doing so. The defendant knew that he was going to rely on the plea of minority to defeat the claim of the plaintiff and it was incumbent upon him when he received the summons to apply forthwith for a copy of the birth register maintained at Chandur. He did not do so then, neither did he do so at any time up to 6th August 1924 for which date the case was fixed for evidence at his request. The Court below had already given him one chance to adduce necessary evidence in support of his plea and if he failed to avail himself of that chance he should only thank himself for the result. The onus was on him to prove that he was a minor when he executed the bond in suit and that he did not receive the full consideration of the bond, and as he failed to substantiate these pleas by adducing reliable evidence, the claim was rightly decreed against him.

It is next urged that as the plaint in this case was originally filed on insufficient stamp paper and as deficient stamp duty was paid after the expiry of the period of limitation, the Court below should have dismissed the suit as barred by limitation. There is no substance in this plea. Where a plaint is filed on an insufficiently stamped paper, the Court has discretion under s. 149 and O. VII, r. 11, C. P. C., to give the plaintiff time to make good the deficiency and to grant further extension if necessary and if the plaintiff pays the deficient Court-fee within the time so granted, though after the expiry of the period of limitation, the plaint upon such payment has the same force and effect as if it had been duly stamped from the commencement. It has accordingly been held in *Gavaranga Sahu* v. *Botokrishna Patro* (1) that where a plaint is presented on a paper insufficiently stamped within the prescribed period of limitation and time is given by the Court to the plaintiff to make good the deficiency and the deficiency is supplied within the time allowed by the Court, but after the expiry of the period of limitation, the suit is not barred.

It is contended before me that the plaintiff filed plaint in this case upon insufficiently stamped paper without sufficient cause and that the Court below was not justified in granting him to pay deficient Court-fee. With reference to this contention, I may point out that it was not raised in the Court below. Plaintiff had alleged in that Court that he could not file the plaint on sufficiently stamped paper as it was not available at Malkapur. This statement of the plaintiff was not challenged by the defendant in the Court below and he did not take any objection in that Court that plaintiff should not have been allowed to pay deficient Court-fee. That being so, it is not open to him to challenge the propriety of the order passed by the lower Court under s. 149, C. P. C. Under that section, the Court had discretion to grant time for payment of deficient Court-fee and the propriety of the exercise of that discretion cannot be challenged in revision.

It is next urged that the Court below had no power to allow time to the plaintiff to pay deficient Court fee before registration of the plaint. No authority has been cited in support of this contention. On the other hand, it is perfectly clear from the language of s. 149, C. P. C., that the Court has power to grant time "*at any stage*" for payment of deficient Court-fee. The use of the words leaves no room for

(1) 4 Ind. Cas. 503; 32 M. 305; 6 M. L. T. 129.

doubt that the Court may grant time before or after registration of the plaint and even after the expiry of the prescribed period of limitation.

It is next urged that this suit was filed by the Receiver without the permission of the Insolvency Court and that the Court below should, therefore, have dismissed it under s. 59 of the Provincial Insolvency Act. This is an entirely new contention which was not urged in the Court below. Had it been urged, the Receiver would have probably been able to prove that he had obtained the Insolvency Court's permission before instituting the present suit. My attention had been invited to the letter addressed by the Insolvency Court to the Receiver to show that permission in writing was granted after the institution of the suit. But it must be remembered that permission need not be in writing. It is possible that the Receiver may have obtained the oral permission of the Insolvency Court before instituting this suit. Moreover, the mere fact that a Receiver appointed under the Provincial Insolvency Act has not obtained the leave of the Court to institute a suit is not fatal to the suit as the obtaining of such leave is a matter between the Receiver and the Insolvency Court whose officer he is and cannot be pleaded as a valid defence by a third person to that suit: *Laduram Nathmull* v. *Nandalal Karuri* (2), *cf. In re Branson, Ex parte Trustee* (3).

The decree of the lower Court is correct and I dismiss this petition with costs. Pleader's fees Rs. 15.

G. R. D. *Petition dismissed.*

Z. K.

(2) 55 Ind. Cas. 747; 47 C. 555; at p. 557; 31 C. L. J. 150.

(3) (1914) 2 K. B. 701; 83 L. J. K. B. 1316; 110 L. T. 940; 21 Manson. 160; 58 S. J. 416.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 108 OF 1924.

March 25, 1925.

Present:—Mr. Daniels, J. C.

RAM BALI SINGH—PLAINTIFF—APPELLANT

versus

JAGDAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Under-proprietary right, creation of, for consideration—Sale of under-proprietary right—Rent reserved in excess of Government revenue—Pre-emption, whether can be claimed.

Where a superior proprietor in consideration of a price paid executes a document creating an under-proprietary right, the transaction amounts to a sale of under-proprietary right and gives rise to a right of pre-emption. The mere fact that the rent reserved in the document is in excess of the Government revenue is not in any way inconsistent with the transaction being one of sale of under-proprietary right. Each case must, however, be decided on the terms of the particular document to be construed. [p. 421, col. 2; p. 422, col. 1.]

A document created a heritable transferable and perpetual *birt* right in favour of the defendant and the grantor did not reserve any right of re-entry or any other right whatever in the property except the right to receive the rent specified:

Held, that the transaction amounted to a sale of under-proprietary right and gave rise to a right of pre-emption. [p. 422, col. 1.]

Ram Faqir v. *Sheo Ratan*, 8 O. C. 121, *Sahib Bux Singh* v. *Thakur Din Singh*, 68 Ind. Cas. 966; 9 O. L. J. 334; 4 U. P. L. R. (O.) 85; (1922) A. I. R. (O.) 229 and *Sant Bakhsh Singh* v. *Bhawani Prasad*, 84 Ind. Cas. 667; 27 O. C. 243; 10 O. & A. L. R. 390; 11 O. L. J. 477; (1924) A. I. R. (O.) 426; L. R. 6 A. (O.) 58; 1 O. W. N. 133, referred to.

Second appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 22nd December 1923, reversing that of the Munsif, Fyzabad, dated the 28th February 1923.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *H. D. Chandra*, for the Respondent.

JUDGMENT.—This is a second appeal in a pre-emption case. The suit was decreed by the Trial Court but dismissed by the Court below on a preliminary ground that no right of pre-emption had arisen. The document on the basis of which the suit is brought is one purporting to confer a perpetual *birt* right. It was executed by the superior proprietor. It has been settled law in this Court since the decision in *Ram Faqir* v. *Sheo Ratan* (1) that where a superior proprietor in consideration of a price paid executes a document creating an under-proprietary right, the transaction amounts to a sale of under-proprietary right and gives rise to a right of pre-emption. In most of the cases which arose the rent reserved was substantially equal to the Government revenue and it was for a long time doubtful whether the same principle applied where rent in excess of the Government revenue was reserved. In *Shaib Bux Singh* v. *Thakur Din Singh* (2) a Judge of this Court

(1) 8 O. C. 121.

(2) 68 Ind. Cas. 966; 9 O. L. J. 334; 4 U. P. L. R. (O.) 85; (1922) A. I. R. (O.) 229.

answered the question in the nagative. Shortly afterwards the question was referred to a Bench in order it might be finally settled and the Bench in *Sant Bux Singh* v. *Bhawani Prasad* (3) overruled the decision in *Sahib Bakhsh Singh* v. *Thakur Din Singh* (2) and held that the fact that the rent reserved in a deed is in excess of the Government revenue is in no way inconsistent with the transaction being one of a sale of under-proprietary right. Each case must be decided on the terms of the particular document to be construed. The Court below has dismissed the suit on the authority of *Sahib Bakhsh Singh* v. *Thakur Din Singh* (2) though holding that the possession of the *birtdar* is for practical purposes that of an under-proprietor. There can in fact be no doubt that an under-proprietary right is created by the deed. The right created is heritable and transferable and the grantor reserves no right whatever in the property except the right to receive rent. He has no power of re entry or any right except the one specified. Following the ruling of the Bench in *Sant Bux Singh* v. *Bhawani Prasad* (3) I hold that the transaction amounts to a sale of under-proprietary right and gives rise to a right of pre-emption.

The respondent has taken another preliminary objection to the appeal on the ground that in the Trial Court the plaintiff had construed the deed as conferring a superior proprietary right and, therefore, it was not open to him to set up a case of under-proprietary right in appeal. On referring to the proceedings in the Trial Court I find that the plaintiff's Pleader did state that he construed the right created by the document as a superior proprietary right. The learned Munsif took the same view but he also considered the case of under-proprietary right and held that if a superior proprietary right was not correct an under-proprietary right certainly was. Under these circumstances it was certainly open to the appellant to raise the point in second appeal and I reject this objection. I, therefore, set aside the decree of the Court below and remand the appeal to that Court under O. XLI, r. 23 for decision on the merits. The issue on the merits which remains to be decided is that contained in ground No. 5 of the grounds of appeal detailed in the judgment of the lower Appellate Court. An issue of estoppel was originally raised in the case but it appears from the judgment of the Court below that it was not pressed in that Court. The appellants will get their costs of the appeal to this Court. Costs of the appeal to the Court below will abide the result.

Z. K. *Decree set aside; Case remanded.*

(3) 84 Ind. Cas. 667; 27 O. C. 243; 10 O. & A. L. R. 390; 11 O. L. J. 477; (1924) A. I. R. (O.) 426; L R. 6 A. (O.) 58; 1 O. W. N. 133.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 534 OF 1921.

March 10, 1924.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

IMAM DIN—PLAINTIFF—APPELLANT

versus

MUHAMMAD DIN FOR HIMSELF AND LEGAL REPRESENTATIVE OF POLA (DECEASED) AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 15, 27 (b)—*Vendor and purchaser—Agreement by major to sell his own and minor nephew's property—Agreement with regard to minor's property void—Suit for specific performance by vendee—Decree for major's share on payment of whole purchase-money—Purchaser in good faith without notice—Burden of proof.*

Where a major agrees to sell property belonging to himself and a minor, whose property he has no right to sell and consequently the agreement with regard to which is void, the purchaser is entitled, if he offers, in a suit for specific performance, to pay the whole purchase-money, to a decree directing the adult vendor to convey all his interest in the property. [p. 424, col. 1.]

Where a vendee claims to have purchased immoveable property for value without notice of a previous contract by his vendor to sell the property to another person, the burden of proving that he had no notice of the previous contract lies upon him. [p. 423, col. 2.]

Naubat Rai v. *Dhaunkal Singh*, 32 Ind. Cas. 953: 38 A. 184; 14 A. L. J. 111 and *Ganga Prasad* v. *Khushal Chand*, 43 Ind. Cas. 940: 14 N. L. R. 27, relied upon.

The burden of proof, however, in such a case is light and may be discharged by the vendee putting himself in the witness-box and stating on oath that he had no knowledge of the previous contract. [*ibid.*]

First appeal from a decree of the Senior Subordinate Judge, Jhang, dated the 22nd December 1920.

Sheikh *Niaz Muhammad* and Lala *Ram Chand Manchanda*, for the Appellant.

Sir Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—This is an appeal against a decree dismissing a suit for the specific performance of a contract for sale.

The following facts will disclose the nature of the question that arises for decision in this appeal.

Defendants Nos. 1 and 2 agreed to sell the land in dispute to the plaintiff of Rs. 5,600 by a deed dated the 19th of September 1919. Defendants Nos. 1 and 2 were originally occupancy tenants of the land. They agreed to sell the land to plaintiff on acquiring proprietary rights therein. The proprietary rights were conferred upon them on the 8th October 1919. Instead of selling the land to the plaintiff they sold it to Abdul Wahab, defendant No. 3, by a registered sale-deed dated the 16th of October 1919. Defendant No. 3 took possession under the deed.

Defendant No. 1 is the uncle of original defendant No. 2 the latter being a minor at the date of the agreement in favour of the plaintiff as well as at the date of the sale in favour of the defendant.

The plaintiff brought the suit for the specific performance of the above agreement. The defendant No. 1 did not put an appearance and the suit proceeded *ex parte* against him. On behalf of the minor defendant it was pleaded that he being a minor, his uncle, defendant No. 1, had no right to sell his share in the land in dispute. Defendant No. 3, the vendee, under the sale-deed, dated the 16th October 1919, pleaded that he had no knowledge of the alleged agreement in favour of the plaintiff and that, therefore, he had a preferential and indefeasible title under his sale-deed.

The principal questions that arose for decision in the Court below upon these pleadings were:—

(1) Whether defendant No. 1 had any right to sell the share of defendant No. 2 who was a minor; and

(2) Whether it lay upon defendant No. 3 to prove that he had no knowledge of the agreement of sale in favour of the plaintiff or whether it was the duty of the plaintiff to prove that the vendee, defendant No. 3, had knowledge of the agreement in his favour.

The Trial Court found that defendant No. 1 had power to sell the share of the minor also and that the burden of proof lay upon the plaintiff to prove positively that defendant No. 3 had notice of the agreement in his favour. It further held that even if defendant No 1 had no power to convey the interests of the minor the plaintiff cannot succeed, as a partial decree for the specific performance cannot be made. Upon these findings the Court below dismissed the suit.

The plaintiff has come up in appeal to this Court, and it has been contended that the decision of the lower Court on the question of the burden of proof is opposed to the current of authorities. There is no doubt that there used to be some controversy as to the burden of proof in such cases but the matter appears to have been set at rest by later authorities, for example, see the case of *Naubat Rai* v. *Dhunkal Singh* (1) and the case of *Ganga Prasad* v. *Khushal Chand* (2).

In our opinion the burden of proof lay upon defendant No. 3 to prove that he had no knowledge of the agreement of sale in favour of the plaintiff. He has given some evidence to prove that he had not this knowledge but this evidence is inconclusive and even if accepted, proves nothing more than that the existence of previous agreement was not discussed at the time of the sale. Defendant No. 3 did not put himself in witness-box nor did he state on oath that he had no knowledge. We should have been prepared to accept light evidence in proof of this issue in negative form but as, in our opinion, there is no evidence at all worthy of the name we are constrained to hold that defendant No. 3 has failed to discharge the burden of this issue.

The other question that requires decision is whether defendant No. 1 had any right to agree to sell the interests of the minor defendant. It has not been seriously contended before us that he had such a right. It is, however, urged that it does not lie in the mouth of defendant No. 3 who has derived his own title from an equally vitiated source, to question the title of the plaintiff. Whatever might be the position in an ordinary suit where it is a question of ordering specific performance it is for the Court to decide whether any relief should be given: and if so, what, and in circumstances like the present where the plaintiff bases one half of his title on a wholly void agreement, we find that he is entitled to no relief so far as the share of the minor is concerned.

The next question that arises is whether a decree for specific performance should be granted in respect of the share

(1) 32 Ind. Cas. 953; 38 A. 184; 14 A. L. J. 111.
(2) 43 Ind. Cas. 940; 14 N. L. R. 27.

of defendant No. 1. The plaintiff has offered to purchase the share of defendant No. 1 alone on payment of the entire consideration, *i. e.*, Rs 5,600. There is authority for such a proposition for example, see *Mahmud Ali* v. *Yawar Beg* (3) and *Panoka Subba Rani Reddy* v. *Vadamadi Seshachellam Chetty* (4). In the latter case it was held that the purchaser in such a case will be entitled on offering to pay the whole purchase-money to a decree directing the adult party to convey all his interest in the properties.

We accordingly accept the appeal in part and direct that defendant No. 1 should execute a sale-deed in favour of the plaintiff conveying all his interests in the property in dispute in consideration of the entire amount of Rs. 5,600 minus Rs. 500 (earnest money already paid). Having regard to the special features of this case we make no order as to costs.

S. D. *Appeal partly accepted.*

(3) 29 Ind. Cas. 628; 13 A. L. J. 739.

(4) 5 Ind. Cas. 79; 33 M. 359; 7 M. L. T. 137; 20 M. L. J. 328.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 16 OF 1924.

April 6, 1925.

Present:—Mr. Dalal, J. C.

Lala HARKISHAN DAS—DEFENDANT No. 2—APPELLANT

versus

Musammat SUNDRO BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Property in custody of Court—Declaration, suit for, whether maintainable—Hindu Law—Gift to wife and daughter, nature of—Stridhan.

Where a certain property is in the custody of the Court which holds it not in its own right but in the right of the rightful owner, a person claiming to be the owner of the property is entitled to maintain a suit for a declaration that he is the owner of the property. [p. 425, col. 1.]

A present of ornaments by a Hindu to his wife and daughter constitutes the ornaments the *stridhan* property of the donees. [p. 425, col. 2.]

Appeal against the judgment and decree of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 24th January 1924.

Mr. *Mahamad Ayub*, for the Appellant.

Messrs. *Bisheshwar Nath* and *Ganga Dayal Khanna*, for the Respondents.

JUDGMENT.—Chhanga Mal, defendant, had four sons Gopi Kishan, Jai Kishan, Har Kishan and Rup Kishan of whom Jai Kishan is dead. The plaintiffs are the widow and daughters of Jai Kishan who also left a son Prem Kishan. The plaintiffs have sued Chhanga Mal and his surviving sons for a declaration that certain ornaments belonged to them and not to the defendants. Prem Kishan was not made a party defendant to the suit. He is a minor. It is not suggested that any person other than the plaintiff, *Musammat* Sundro, his natural guardian is guardian of his property.

The property in suit is at present in the custody of a Court of law, which happens to be the lower Court itself. In that Court Rup Kishan had brought one suit the object of which was to establish that certain properties were joint family properties and not the separate self-acquired properties of Jai Kishan and Har Kishan. There was another suit by Prem Kishan for partition between himself and Har Kishan. In both suits the property in suit was not involved. In fact, in the present suit Rup Kishan has admitted that the property in suit belongs to the plaintiffs while the former suit by Prem Kishan was brought under the guardianship of *Musammat* Sundro, one of the plaintiffs to the present suit.

Only Har Kishan has appealed and no other defendant from the decree for declaration granted by the lower Court. The legal ground of appeal was that the suit offended against the proviso to s. 42 of the Specific Relief Act. The lower Court has rightly pointed out that the property is in the custody of a Court and not in the custody of any of the defendants, so the plaintiff was not entitled to seek further relief by way of possession. A ruling of the Madras High Court, *Vedanayaga Mudaliar* v. *Vedammal* (1), has been quoted by the learned Judge of the lower Court. Besides that ruling I am of opinion that a case of the Allahabad High Court decided by a Bench: *Jagannath Gir* v. *Tirguna Nand* (2), also negatives the appellant's contention. There the property was in possession of the Court of Wards and rival *Mahants* were claiming succession thereto on the death of the last reigning *Mahant*. One *Mahant* sued other *Mahants* for a declaration of title. The Trial Court in that

(1) 27 M. 591

(2) 23 Ind Cas 139; 37 A 185; 13 A. L. J. 252.

suit held that the Court of Wards was a necessary party and, therefore, a declaratory suit offended against the proviso to s. 42. The High Court reversed this view and held that as between the parties to the suit no relief for possession could be claimed and there was no necessity to make the third person in possession a party defendant to the suit. In the present case also the Court is holding property not in its own right but for the rightful owner and when the rightful owner obtains a declaration the Court will be willing to part with the property to that owner.

As regards the ownership, I find considerable difficulty in understanding the position of Har Kishan appellant. He wants to bring into issue the question whether the ornaments are the property of Jai Kishan deceased or the *stridhan* of his widow and daughters. In the same breath he admits that he himself has no title to the property even if it belonged to Jai Kishan. If the property belonged to Jai Kishan it would be inherited by Prem Kishan and not by the appellant. What interest the appellant has to prosecute this appeal his learned Counsel was unable to explain. As already pointed out, these ornaments are not in dispute in the two suits respectively brought by Rup Kishan and Prem Kishan in the lower Court and still pending there. Even if these ornaments had been included in the plaints of those suits Rup Kishan has now specifically declared that the ornaments belong to the plaintiffs and Prem Kishan is represented in the formers suit by his mother. If Prem Kishen afterwards has any claim he would have one against his mother and not against Har Kishan.

It was also suggested that Har Kishan had the custody of the property so Prem Kishan may on a future date demand the property back from him. Of this custody there is no proof whatsoever on the record. The gentleman appointed by the Court in the pending suits of Rup Kishan and Prem Kishan to fetch the ornaments declared that he took them from the custody of Chhanga Mal and not from the custody of Har Kishan.

When Rup Kishan admits the ornaments belong to the plaintiffs and when in the box containing the ornaments itself a piece of paper was found with a declaration that the ornaments were of Bibi Sundro (one of the plaintiffs of this suit), there cannot be the slightest doubt that the ornaments are *stridhan*. It appears that Jai Kishan was a war profiteer and made money during the war in business. He made the ornaments for his wife and daughter and the surrounding circumstances are such as to lead to the conclusion that he made a present of them to his wife and daughter. There is no necessity for specific evidence that he in a public manner made such presents. The finding of the lower Court is perfectly correct that the ornaments are the *stridhan* property of the plaintiff females

As to limitation, the slip inside the box containing the ornaments leaves no doubt in my mind that *Musammat* Sundro deposited these ornaments with Chhanga Mal the most senior member of the family of Jai Kishan. The receiver has stated that even in 1921 when he took charge of the ornaments Chhanga Mal declared that they belonged to the plaintiffs. The dishonest intention was obviously subsequent and must have arisen in the minds of the contesting defendants subsequent to 1st February 1921. The cause of action given in para. 13 of the plaint to have arisen in March and May 1922 appears to be correct and I hold accordingly. There is, therefore, no bar of limitation.

I dismiss this appeal with costs.

Z. K *Appeal dismissed.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 33 OF 1924.

December 22, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, Mr. Justice Lentaigne and Mr. Justice Cunliffe.

MAUNG SHWE MYAT—APPLICANT

versus

MAUNG PO SIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Promissory-note, suit on—Alternative cause of action, whether can be allowed to be set up.

Where a plaintiff sues on a promissory-note simply and solely without adding an alternative cause of action based on the original loan, he can be allowed to succeed on such original cause of action after making the necessary amendment. [p. 426, col. 2.]

In such a case the necessary amendment should be allowed where the original loan is admitted and where the sole result of refusing it would be to force the plaintiff to file another suit.

ORDER OF REFERENCE TO A FULL BENCH.

Young, J.—The only question in this appeal is whether when a plaintiff sues on a promissory-note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action.

In the Full Bench case of *Maung Kyi* v. *Ma Ma Gale* (1) the following question was referred to the Full Bench, "Where money is lent and at the same time a promissory-note is given therefor, can the creditor sue for the money due as on the original contract of loan, if the promissory-note cannot be proved?"

The question was answered by the majority of the Full Bench in the affirmative, but the case referred does not seem to touch the present question, though the suit on which the reference was made seems as here to have been on a promissory-note purely and simply. The question referred was merely whether the creditor could *sue* for the money as due on the original contract of loan, and did not take into consideration the question whether he could *sue* on the original cause of action without having pleaded it. The cases in India are at variance on the point. But in *Baijnath Das* v. *Saligram* (2) the latest, I can find, it was held that where a promissory-note which is inadmissible in evidence is taken for a pre-existing debt, the creditor may recover the debt. The action will be for money had and received and the suit brought on the promissory-note will be treated as suit for money had and received provided that the pleadings are properly framed for that purpose.

I agree with this ruling and as the question referred to the Full Bench in *Maung Kyi* v. *Ma Ma Gale* (1), does not seem to me to raise the point, I refer the following question to a Bench, Full or otherwise, as the Chief Justice may direct, "Whether where a plaintiff *sues* on a promissory-note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action."

Mr. *Ba Thein*, for the Applicant.

Mr. *R. M. Sen*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Robinson, C. J.—The question referred to the Full Bench is whether, where a plaintiff sues on a promissory note simply and solely without adding an alternative cause of action based on the original loan, he should be allowed to succeed on such original cause of action.

In *Maung Kyi* v. *Ma Ma Gale* (1) it was held that, where money is lent and at the same time a promissory-note is given therefor, the creditor is not debarred from suing for the money lent as on the original contract of loan, if the promissory-note cannot be proved.

In the present case there was no prayer for a decree based on the original loan; but the matter appears to us to be covered by the previous Full Bench ruling for an amendment of the pleadings can be allowed at any stage of the proceedings and could have been allowed in this case. After amendment, the case will be covered by the previous Full Bench decision. Amendment could clearly be allowed in a case where the original loan is admitted and where the sole result of refusing it would be to force plaintiff to another suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has now been introduced.

I would answer the question referred by saying that he should be so allowed after the necessary amendments have been made.

Lentaigne, J.—I concur.

Cunliffe, J.—I concur.

Z. K. *Answered accordingly.*

(1) 51 Ind. Cas. 84; 10 L B. R. 54; 12 Bur. L R. 137.

(2) 16 Ind. Cas. 33.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 769 OF 1923.

June 4, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice.

THE FIRM KUNDAN LAL-MUKANDI LAL—PLAINTIFF—PETITIONER

versus

KANSHI RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Law of Limitation, whether can be evaded by use of s. 151, C. P. C.—Ex parte *decree, application for setting aside barred—Decree, whether can be set aside under s. 151, C. P. C.*

Where a definite period of limitation has been prescribed by law within which action could be taken, a Court is not entitled to extend such period by invoking s. 151 of the C. P. C.

Ajodhia Mahton v. *Phul Kuer*, 65 Ind. Cas. 341; 1 Pat. 277; (1922) Pat 61; (1922) A. I. R. (Pat.) 479, relied upon.

Therefore, where an application to set aside an *ex parte* decree is barred by time, a Court cannot evade the Law of Limitation by acting under s. 151 of the C. P. C.

Petition, under s. 44 of Act VI of 1918, for revision of an order of the Subordinate Judge, Fourth Class, Jagadhri, District Ambala, dated the 6th August 1923

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—An *ex parte* decree was granted to the plaintiff on 7th January 1920, and it was not until 21st February 1923 that the defendants made an application for an order to set aside the *ex parte* decree. Now, summons were duly served upon the defendants and the *terminus a qua* under Art. 164 of the Limitation Act is the date of the decree. The application to have the decree set aside was consequently barred by time.

The learned Judge of the lower Court is, however, of opinion that he can evade the Law of Limitation by acting under s. 151, C. P. C. This view is entirely erroneous. Where a definite period of limitation has been prescribed by law within which action could be taken, a Court is not entitled to extend such period by invoking s. 151 of the C. P. C. If any authority were needed on the subject, I would refer to the judgment of the Patna High Court in *Ajodhia Mahton* v. *Phul Kuer* (1).

I accordingly accept the application for revision and dismiss the application made by the defendants for setting aside the *ex parte* decree. The defendants must pay the costs incurred by the plaintiff in this Court as well as in the Court of first instance.

S. D. *Application accepted.*

(1) 65 Ind. Cas. 341; 1 Pat. 277; (1922) Pat. 61; (1922) A. I. R. (Pat.) 479.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 160 OF 1924.

May 27, 1925.

Present:—Mr. Justice Sulaiman and Mr Justice Daniels.

ZORAWAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGWAN SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 111, 233 (k)—Partition- -Question of title, raised but not decided, effect of—Jurisdiction of Civil Court.

Section 233 (*k*) of the U. P. Land Revenue Act is not limited to cases in which a question of proprietary right has been determined under s. 111 of the Act. Where a question of proprietary right is definitely raised by a party before the partition Court but the relief asked for is not granted by that Court the relief must be deemed to have been refused and the aggrieved party cannot subsequently reagitate the same matter in the Civil Court. [p. 428, cols. 1 & 2.]

A revenue partition operates as a clearing up of disputed titles and a title declared at a partition may be safely relied on against all persons who were parties to the partition proceedings. [p. 428, col. 2.]

The final allotment of land on a partition is conclusive even though the question of proprietary title which it is subsequently sought to raise in a civil suit was not directly raised and decided in the partition. [*ibid.*]

Ram Subhag Singh v. *Dip Narain Singh*, 64 Ind. Cas. 438; 44 A. 74; 19 A. L. J. 855 ; (1922) A. I. R. (A.) 158, *Gokaran Singh* v. *Ganga Singh*, 52 Ind. Cas. 779; 42 A. 91; 17 A. L. J. 1072, 1 U. P. L. R. (A.) 136, *Nasir Ahmad* v. *Muhammad Sharif*, 79 Ind. Cas. 345; 46 A. 453; (1924) A.I.R. (A.) 682; L. R. 5 A. 110 Rev., *Bhupal Singh* v. *Ujagar Singh*, 58 Ind. Cas. 122; 18 A. L. J. 928; 2 U. P. L. R. (A.) 306; 43 A. 83, and *Bijai Misir* v. *Kali Prasad Misir*, 41 Ind. Cas. 912; 39 A. 469; 15 A. L. J. 496, followed.

First appeal from an order of the Subordinate Judge, Muttra, dated the 1st August 1924.

Mr. *N. P. Asthana*, for the Appellants.

Dr. *K. N. Katju* and Mr. *Gopinath Kunzru*, for the Respondents.

JUDGMENT.

Daniels, J.—The question for decision in this appeal is whether the present suit is barred by the provisions of s. 233 (*k*) of the Land Revenue Act. The present suit is for a declaration that the plaintiffs are owners in possession of an area of 25·17 acres out of a *khata* of 104 acres in *Mahal* Bhagwan Singh, *Mauza* Sampat Jogi and that the defendants are wrongly entered in the revenue papers as owners of the equity of redemption. The area of which the property in dispute forms a part was originally mortgaged to Sahib Singh, a collateral relative of the parties. The plaintiffs are sons of Gulab Singh, the head of another branch, and the defendants are the heirs of Durg Singh who represented a third branch of the family. The equity of redemption in this property was purchased in equal shares in the names of Durg Singh and Sahib Singh at some time subsequent to the mortgage.

On 17th March 1909 the plaintiffs applied for partition of this property impleading Durg Singh whose name they asserted to be fictitiously entered in the *khewat* and whom they asserted to have no proprietary interest in the property. There is on the record of the partition suit an application purporting to be made by Durg Singh admitting that his name was fictitiously entered. The petition was not verified and in the partition as finally made Durg Singh continued to be recorded as proprietor of the area now in dispute and the sons of Gulab Singh as mortgagees. The Trial Court held that s. 233 (*k*) applied and dismissed the suit. The lower Appellate Court has reversed this finding and remanded the suit for decision on the merits. The argument of the respondents, which found favour with the learned Subordinate Judge, is that as no question of proprietary right was raised by any co-sharer under s. 111 or s. 112, the question was never decided by the Revenue Courts, and further that s. 233 (*k*) cannot apply as the share in dispute and the share allotted to the plaintiffs were both included in one *mahal*.

It appears to us however that the rulings of this Court do not permit us to accept this contention. Section 233 (*k*) is not limited to the case in which a question of proprietary right has been determined under s. 111. In this case the question of proprietary right involved was definitely raised by the plaintiffs in their application to the partition Court and as the relief which they asked for in respect of this land was not granted, it must be deemed to have been refused. A Bench of this Court held in *Ram Subhag Singh* v. *Dip Narain Singh* (1) that the final allotment of land at a partition is conclusive even though the question of proprietary title which it is sought to raise in the civil suit was not directly raised and decided in the partition. We may refer to *Gokaran Singh* v. *Ganga Singh* (2). *Nazir Ahmad* v. *Muhammad Sharif* (3) is a recent instance of the application of the same principle. The learned Judges say :—

"It seems to us that the Legislature has given the Revenue Courts exclusive jurisdiction over the partition of a *mahal* among recorded co-sharers.....There is no doubt that if the plaintiffs had framed their suit so as to confine their claim merely to damages, they might have succeeded. But they have chosen to join this claim to a claim to obtain exclusive possession of certain specified plots, which undoubtedly are the subject of the partition".

In *Bhupal Singh* v. *Ujagar Singh* (4) the plaintiff sued for a declaration of his title to a pre-empted share which had not been allotted to him at the partition. The Letters Patent Bench, affirming the decision of the Judge who heard the appeal, held that the case was governed by the Full Bench ruling in *Bijai Misir* v. *Kali Prasad Misir* (5), and that s. 233 (*k*) was a bar to the suit. Whatever may be said against this rule it has at least this great advantage that a revenue partition operates as a clearing up of disputed titles, and that a title declared at a partition may be safely relied on against all persons who were parties to the proceedings.

The course of decision of this Court has now definitely established the principle that s. 233 (*k*) debars Civil Courts from questioning the final allotment of land and

(1) 64 Ind. Cas. 438; 44 A. 74; 19 A. L. J. 865; (1922) A. I. R. (A.) 158.
(2) 52 Ind. Cas. 779; 42 A. 91; 17 A. L. J. 1072; 1 U. P. L. R. (A.) 136.
(3) 79 Ind. Cas. 345; 46 A. 453; (1924) A. I. R. (A.) 682; L. R. 5 A. 110 Rev.
(4) 58 Ind. Cas. 122; 18 A. L. J. 928; 2 U. P. L. R. (A.) 306; 43 A. 88.
(5) 41 Ind. Cas. 912; 39 A. 469; 15 A. L. J. 496.

title effected by means of a partition, and to depart from this rule would merely be to throw the law again into the state on uncertainty which formerly prevailed regarding it.

We think, therefore, that in the view of the scope of s. 233 (*k*) which has been accepted by this Court the appeal must be allowed and the decree of the Trial Court restored. We direct accordingly. The appellants will get their costs of this appeal including fees on the higher scale.

Sulaiman, J.—I concur in the proposed order. As the plaintiffs had definitely asked the partition Court to allot to them exclusively the property entered in the name of Durg Singh on the allegation that his name was fictitiously recorded and as the Court did not grant their prayer, it must be deemed to have been refused. The plaintiffs cannot now re-agitate the same matter in Civil Court.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 123 OF 1923.

April 16, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

Sayad NUR HUSSAIN SHAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat HUSSAIN BIBI—DEFENDANT—RESPONDENT.

Religious Endowments Act (XX of 1863), s. 14—Suit for removal of trustee—Validity of trustee's appointment, whether can be gone into—Trustee's conduct not inspiring confidence—Removal.

In a suit, under s. 14 of the Religious Endowments Act, for the removal of a trustee, the question of the validity of the appointment of the trustee cannot be gone into. [p. 430, col. 2.]

The interests of a trust are supreme and a Court must have regard to such interests in dealing with he question whether the persons appointed as trustees are persons who can be properly entrusted with the management of the institution. Therefore, where it is clearly proved that the interests of the trust have not been kept in view and that the trustee's conduct has not been such as to inspire confidence, a Court should direct removal of the trustee. [p. 432, col. 1.]

Mahomed Ismail Ariff v. *Ahmed Moolla Dawood*, 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517; 43 I. A. 127 (P. C.), referred to.

First appeal from a decree of the District Judge, Lahore, dated the 3rd January 1923.

Bakhshi *Tek Chand* and Mr. *Nihal Chand Mehra* and Lala *Mehr Chand Mahajan*, for the Appellants.

Lala *Badri Das*, R. B., and Lala *Tirath Ram*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs under s. 14 of the Religious Endowments Act (XX of 1863) in respect of a religious institution at Lahore known as the *Takia* Rasul Shahian.

The first two plaintiffs are the incumbents of the *gaddis* at Alwar and Hindon in the Bharatpur State respectively and the other two are certainRasul Shahi Fakirs having an interest in the maintenance and preservation of the *wakf* which is the subject-matter of dispute in the present litigation. The defendant *Musammat* Hussain Bibi is the daughter of one Nazir Hussain, also a Rasul Shahi Fakir, and has been in possession of the trust property ever since the death of her father which took place in 1899. It was alleged in the plaint that the defendant was not a validly appointed trustee and that even if she was she was not fit to remain in charge of the office any longer inasmuch as she has been setting up an adverse title of her own and has been otherwise misconducting herself in discharge of her duties as a *gaddinashin*. It was accordingly prayed that the defendant be removed from the position of a trustee and that it be declared that the plaintiffs have the right to appoint another in her place. It appears that in 1913 the defendant had alienated certain trust properties and had described herself in the sale-deeds as the exclusive owner thereof. In the suit as originally instituted the alienees were also impleaded as defendants and it was prayed that the said alienations be set aside and declared null and void. The learned District Judge, however, by his order dated the 7th Decem-

ber 1920, held that the alienees were not proper parties to the suit and that the plaintiffs should confine their suit to the reliefs claimed against *Musammat* Hussain Bibi alone. The names of the alienees were accordingly struck off the list of the defendants and the plaintiffs were directed to file an amended plaint. The defendant repudiated the allegations made by the plaintiffs in their plaint and contended that she had been duly appointed a *gaddinashin* and had properly managed the institution. The only issue framed was as follows:—

Is *Musammat* Hussain Bibi liable to be removed from her office as trustee because:—

(*a*) She was not lawfully appointed;

(*b*) She has misconducted herself in that position.

The learned District Judge held that the validity of the appointment of the defendant as *gaddinashin* could not be challenged in this suit and that the plaintiffs had entirely failed to show that the defendant had in any way neglected her duties as a trustee or that she had committed any act of misfeasance or breach of trust which would justify her removal from the office. The suit was accordingly dismissed. Against this decision the plaintiffs have preferred a first appeal to this Court and we have listened to lengthy arguments by Counsel on both sides.

The first point which we have to consider is whether it is competent to the plaintiffs to question the validity of the defendant's appointment as a trustee in this suit. The suit is clearly one under s. 14 of the Religious Endowments Act and has been instituted after the necessary permission under s. 18 of the Act was obtained from the District Judge. Now s. 14 of the Religious Endowments Act is in the following terms:—

"Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court, the trustee, manager or superintendent of such mosque, temple, or religious establishment, or the member of any committee appointed under this Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent or member of such committee, in respect of the trusts vested in, or confined to them respectively, and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent, or member of a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, manager, superintendent or member of a committee." The section clearly contemplates that there is a trust in existence and that the person in whom that trust vests is a validly appointed trustee or manager in respect thereof. The section only deals with the condition under which a trustee or a manager could be removed from his office and makes no reference to the question of his appointment as such trustee or manager. If a suit is instituted for the removal of a trustee under this section the only question with which the Court has to deal is whether the defendant has or has not been guilty of any misfeasance, breach of trust, or neglect of duty. If the plaintiffs' allegations as to the defendant having committed acts of misfeasance or breach of trust are proved the Court may direct his removal from the office, but we do not think that it is competent to the Court to hold an enquiry into the question as to whether the original appointment was or was not valid. It has been argued that the defendant is a female and that according to the rules of the Rasul Shahi sect, a female cannot hold office of a *gaddi nashin*. It has further, been argued that the defendants' father Nazir Hussain, was also a trespasser and that he had never been appointed a trustee in accordance with the rules laid down by the parent shrines at Alwar in this direction. In our opinion these points are clearly irrelevent to the present case, and we must hold for the purpose of this suit that the defendant was a validly appointed trustee and that the question of the validity of her appointment cannot be questioned in this suit.

As to the second question we are unable to agree with the finding of the learned District Judge that the defendant has not neglected her duties and that the charge of misfeasance of breach of trust has not been established against her. The question is clearly one of fact and depends entirely upon the inference to be drawn from the evidence in the case. It was alleged in the

plaint that the objects for which the trust was created were the following:--

1. to hold *urs* every year,
2. to feed *fakirs*, *i. e.*, *darweshes* and arrange for their residence and comfort.
3 to perform *kawali* and *khatam* every Thursday.
4. to solemnize all ceremonies of Rasul Shahi Fakirs, and
5. to discharge duties connected with the mosque, etc., and to appoint a capable *Imam* of the mosque.

The plaintiff's case is that the defendant ever since the date of her taking charge of the property has carried out not even one of the objects above recited and that she has been bringing the income of the trust property to her own private use. A large number of witnesses have been produced who deposed that the defendant has mismanaged the property and that she has committed other acts of misfeasance which are not calculated to inspire confidence in her career as a trustee and which render her absolutely unfit to remain in charge of the office any longer. Nur Hussain (P. W. No. 1) states that the defendant and her father, Nazir Hussain, have been causing much damage to the trust property and that they have even removed the tomb of Pir Gohar Shah, a previous incumbent of the shrine, and have been tying a she-buffalo on that place. He further states that the bricks of the *tharra* have been taken out and sold and that the big gate has also been taken out and sold. The income of the shrine according to him ought to be spent on improving the shrine and keeping a *langar*, but the defendant has been doing quite the reverse He also deposed to the effect that the defendant has misappropriated the whole income. The witness is supported in the allegations made by him by Saidullah Khan (P. W. No. 3), Karam Ali (P. W. No. 10), Ghulam Mohammad (P. W. No. 11), Allah Ditta (P. W. No. 26), and a number of other witnesses whose names it is not necessary to mention in this judgment. Indeed the defendant's own witnesses have admitted that they had never seen any *urs* being performed in this shrine during the incumbency of the defendant. Allah Bakhsh (D. W. No. 1) states that there never was an annual fair at the *Takia*, Allah Ditta (D. W. No. 2) states that no annual fair has ever been held at the *Takia*. Muhammad Ibrahim (D. W. No. 3) and Lakhmi Das (D. W. No. 6) have also made similar statements. Sowaya Mal (D. W. No. 5) states that no annual fair has been held at the *takia* for the last six or seven years. Sultan Ahmad (D W. No. 7) says that he has not seen any *urs* taking place for the last 18 years. Rahim Bakhsh (D W. No. 8), Khuda Bakhsh (D. W. No. 9), Ghulam Hussain (D. W. No. 10) and Nur Muhammad (D. W. No. 11) have also deposed to the effect that they have never seen any annual fair being held at the *takia*. No evidence has been produced by the defendant to prove that she has been feeding any *fakirs* or making any arrangements for their residence and comfort in this shrine. As to any *kawali* or *khatam* being performed at the shrine there is not the slightest evidence on the record, not is there any evidence to show that the mosque, has been properly looked after or that any capable *Imam* has been appointed to lead the prayers. The most serious charge against the defendant, however, is that she has been setting up an adverse title of her own and has been persistently denying the religious character of the property. In a sale-deed dated the 20th February 1913 executed by her in favour of Sheikh Ata Ilahi she describes herself as the exclusive owner of the property, having inherited the same under a Will executed by her late father Nazir Hussain on the 18th August 1899. By this deed she alienated 15 *marlas* of land for a sum of Rs. 2,000 and it was stated in the deed that out of the sale consideration of Rs. 2,000 a sum of Rs. 1,000 was required to redeem a certain house known as the *kothi* and the rest for the construction of new houses for her own residence. On the 4th September she executed another sale deed of 5 *marlas* of land in favour of Sheikh Abdul Rahman for a sum of Rs. 980 necessity for the sale being to pay off a decree outstanding against her. In this sale-deed also she has described herself as the absolute owner of the land sold and has clearly denied the religious character of the property. In a previous suit instituted in 1914 by Nur Hussain Shah and others for a declaration that the property was *waqf* and that they were entitled to its possession and management, the defendant *Musammat* Hussain Bibi stated that the property was not *wakf* and that she was the exclusive owner thereof The finding of the Court, however, was against the defendant and it was held that the property was *wakf* and she was not its exclusive owner. It is prob-

ably on account of this finding that in the present suit the defendant has admitted the religious character of the property and has not set up her own title in respect thereto. Her witnesses, however, do not support her in the position that she has taken up in this suit, and it is obvious from their evidence that the defendant has always treated the property as her own and has never admitted that it was *wakf*. Allah Bakhsh (D. W. No. 1) states that the defendant is the absolute owner of the property and so was her father before her. Allah Ditta (D. W. No. 2) states that the defendant sold a plot of land attached to the *takia* and that the sale proceeds went to pay her father's debts. Muhammad Ibrahim (D. W. No. 3) stated that people have always treated the defendant and her father as the absolute owner of the property and that he has never seen any outsider paying a visit to the *takia*. Sultan Ahmad (D. W. No. 7) gives a similar statement and says that the *takia* is the ancestral property of *Musammat* Hussain Bibi. It is thus obvious that the defendant has persistently contended that the property connected with the *gaddi* has not a religious foundation and that the property claimed as public trust was the private property of herself and her late father, Nazir Hussain. In the case of *Mohammed Ismail Ariff* v. *Ahmed Moolla Dawood* (1), it was laid down by the Privy Council that the interests of the trust are supreme and the Court must have regard to such interests in dealing with the question whether the persons appointed as trustees are persons who can be probably entrusted with the management of the institution. In the present case it is clearly proved from the evidence produced on both sides that the interests of the trust have not been kept in view and that the defendant's conduct has not been such as to inspire confidence. There is no doubt that it has been held in some cases that the mere denial of the existence of a public trust, if *bona fide*, does not by itself disqualify the man from being appointed or retained as trustee of the institution. We are, however, convinced that this is not such a case and that under the circumstances the retention of the defendant as trustees should not be upheld and that she should be removed from the trusteeship of the *gaddi* in question.

We accordingly accept the appeal and setting aside the order of the learned District Judge decree the plaintiffs' suit with costs throughout.

S. D. *Appeal accepted.*

(1) 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517; 43 I. A. 127 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 37-B OF 1924.

April 9, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

BAPUJI—PLAINTIFF—APPELLANT

versus

KISAN—DEFENDANT—RESPONDENT.

Malicious prosecution—Damages, suit for—Reasonable and probable cause, what is—Conviction of plaintiff in First Court—Acquittal in Appellate Court—Presumption—Burden of proof.

In a suit to recover damages for malicious prosecution it is incumbent on the plaintiff to prove (*a*) that he was prosecuted by the defendant, (*b*) that the prosecution ended favourably to him, his innocence having been pronounced by a competent tribunal and (*c*) that the defendant acted without reasonable and probable cause and (*d*) that the defendant was actuated by malice. [p. 433, cols. 1 & 2.]

Gopalakrishna Kudva v. *Bangle Narayan Kamthy*, 45 Ind. Cas. 803; 34 M. L. J. 517; 23 M. L. T. 341; 7 L. W. 604; (1918) M. W. N 454, *Crowdy* v. *Reilly*, 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105, and *Battu Lal* v. *Ramchand*, 12 C. P. L. R. 24, followed.

In such a suit the mere production of the judgment of the Criminal Court by the plaintiff is not enough to prove his innocence. [p. 433, col. 2.]

Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. [*ibid.*]

If the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false, or on the wilful suppression by him of material facts. [p. 434, col. 1.]

Jagnarayan Dubey v. *Bidapat Dubey*, 72 Ind. Cas. 409; (1923) A. I. R. (Pat.) 341; 4 P. L. T. 202; 1 Pat. L. R. 332, *Jadubar Singh* v. *Sheo Saran Singh*, 21 A. 26; A. W. N. (1898) 161; 9 Ind. Dec. (N. S.) 728, and *Sham Bibi* v. *Chairman of Baranagore Municipality*, 6 Ind. Cas. 675; 12 C. L. J. 410, followed.

Appeal against a decree of the Second Additional District Judge, Akola, dated the

31st January 1923, in Civil Appeal No. 27 of 1923.

Messrs. *A. V. Khare* and *W. B. Pendharker*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.--This appeal arises out of a suit for damages for malicious prosecution. It appears that the defendant had prosecuted the plaintiff for the offence of extortion punishable under s. 384, Indian Penal Code. His case in the Criminal Court was that the cattle belonging to the plaintiff had trespassed upon his land and damaged his crop, that he consequently impounded them, that the plaintiff had to pay Rs. 14-14 in order to get his cattle released from the cattle pound, and that plaintiff subsequently realised this sum forcibly from him by using threats and by wrongfully confining him in his house. The Trying Magistrate convicted the plaintiff under s 384 of the Indian Penal Code and sentenced him to two months' simple imprisonment and fined him Rs. 25. On appeal the Sub-Divisional Magistrate maintained the conviction but reduced the sentence. Plaintiff thereupon applied to this Court to revise the order of the Sub-Divisional Magistrate and this Court on revision quashed the conviction of the plaintiff and acquitted him. Plaintiff alleged that the defendant had prosecuted him in the Criminal Court without reasonable and probable cause and that in doing so he was actuated by malice. He claimed Rs. 2,000 as damages from the defendant.

The Trial Court found that the defendant acted maliciously and without reasonable and probable cause in instituting a complaint against the plaintiff and passed a decree for Rs. 955 with proportionate costs against him. The Additional District Judge on appeal came to the conclusion that the plaintiff had failed to prove malice and want of reasonable and probable cause. He, therefore, set aside the decree of the First Court and dismissed plaintiff's claim with costs. Against this decree plaintiff has preferred this appeal.

It has been repeatedly held that in a suit to recover damages for malicious prosecution it is incumbent on the plaintiff to prove the following things :—

(1) that he was prosecuted by the defendant,

(2) that the prosecution ended favourably to him, his innocence having been pronounced by a competent Tribunal,

(3) that the defendant acted without reasonable and probable cause, and

(4) that the defendant was actuated by malice: [*Gopalakrishna Kudva* v. *Bangle Narayan Kamthy* (1), *Crowdy* v. *Reilly* (2) and *Battu Lal* v. *Ramchand* (3).]

It has further been held that in such a suit the plaintiff has in the first instance to prove his innocence and that for this purpose it is not enough for him to produce the judgment of the Criminal Court, which terminated in his acquittal: *Goberdhan Singh* v. *Ram Badan Singh* (4). It is, therefore, necessary to see whether the plaintiff has succeeded in establishing that the defendant acted maliciously and without reasonable and probable cause in prosecuting him for the offence punishable under s. 384, Indian Penal Code. On this point the lower Appellate Court has given a finding against him. He, however, challenges the correctness of this finding by urging that the lower Appellate Court has not understood the meaning of the expression "reasonable and probable cause" and has misappreciated the evidence adduced by him (plaintiff) on this point. The expression "reasonable and probable cause" has been defined by Mr. Justice Hawkins in *Hicks* v. *Faulkner* (5). In that case after making it clear that to succeed in an action for malicious prosecution the plaintiff must allege and establish both (*a*) absence of reasonable and probable cause and (*b*) malice, the learned Judge has defined "reasonable and probable cause" as "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." With this definition before us let us see how far the plaintiff has succeeded in establishing the absence of reasonable and probable cause on the part of the defendant in instituting criminal proceedings against him.

(1) 45 Ind. Cas. 803; 34 M. L. J. 517; 23 M. L. T. 341; 7 L. W. 604; (1918) M. W. N. 454.
(2) 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105.
(3) 12 C. P. L. R. 24.
(4) 67 Ind. Cas. 65; 44 A. 485; 20 A. L. J. 284; (1922) A. I. R. (A.) 209.
(5) (1882) 8 Q. B. D. 167; 51 L. J. Q. B. 238; 30 W. R. 545.

Before I proceed to consider the evidence on this point I should like to point out that as the plaintiff was convicted by the Trying Magistrate and his conviction was upheld on appeal though set aside by this Court on revision the onus lay very heavily on him to prove the absence of reasonable and probable cause. It has been repeatedly held that if the plaintiff has been convicted in the first instance and ultimately acquitted on appeal the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material facts : *Jagnarayan Dubey* v. *Bidapat Dubey* (6), *Jadubar Singh* v. *Sheo Saran Singh* (7) and *Shama Bibi* v. *Chairman of Baranagore Municipality* (8). In the present case it is admitted that the defendant had impounded plaintiff's cattle, the plaintiff was required to pay Rs. 14-14 to the pound-keeper to have his cattle released from the cattle-pound, and that this amount was recovered by the plaintiff from the defendant. Defendant's case is that this amount was extorted from him by the plaintiff and that he had to pay it under compulsion, as the plaintiff had wrongfully confined him in his house and had refused to release him unless he paid the money. The evidence which the plaintiff himself has adduced in this case materially supports the allegations of the defendant. The first witness examined by the plaintiff is himself. In his cross-examination he says: "defendant believed that I extorted money from him whereas I thought I realised it under authority of *panchas* with defendant's consent. The criminal complaints were only a tragedy of errors." P. W. No. 2 says "plaintiff said nothing in reply to defendant's reference about (*sic*) I, however, then believed that defendant was paying the sum under some complusion from plaintiff. Defendant was never on bad terms with plaintiff and would not file false complaint against him to cause damage to him." P. W. No. 3 also says "defendant is a moneyed man and also owns about 50 *tiffans* of land. He is not likely to file false complaints against plaintiff." The evidence of P. W. No. 4 is very important. He says "plaintiff came there first and demanded money from defendant either willingly or by force and said that any how he would recover the amount. Defendant said that he would pay it and that no force should be used and he went away. He paid the amount through Chhote Singh *under compulsion*. The day bofore, defendant was wrongfully confined at plaintiff's house at Tighara and several persons from Meh went there to bring him but not myself. He thus paid the amount under pressure. Plaintiff is a troublesome man. Defendant is a non-interfering person and a man of status. He is not likely to file false complaints."

It is unnecessary to refer to the other evidence adduced by the plaintiff. The evidence given by the defendant fully proves that money was forcibly realised by the plaintiff from him and this has been amply corroborhted by the evidence, which plaintiff himself has adduced in this case and which has already been referred to above. Under these circumstances the lower Appellate Court was perfectly justified in holding that the defendant had reasonable and probable cause in prosecuting the plaintiff. Plaintiff's claim was rightly dismissed and I dismiss this appeal with costs. Costs in the Courts below will be paid as ordered by the lower Appellate Court.

Z. K. *Appeal dismissed.*

(6) 72 Ind. Cas. 409; (1923) A. I. R. (Pat.) 344; 4 P. L. T. 202: 1 Pat. L. R 332.

(7) 21 A. 26; A. W. N. (1898) 161; 9 Ind. Dec. (N. S.) 728.

(8) 6 Ind. Cas. 675; 12 C. L. J. 410.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2347 OF 1923.

April 3, 1924.

Present:—Mr. Justice Abdul Raoof.

FEROZE DIN—DEFENDANT—APPELLANT

versus

Musammat GHULAM FATIMA—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Dispute between husband and wife compromised while complaint of uncompoundable offence pending against husband—Compromise arranged and effected independently of criminal case, whether bad in law.

A deed of compromise, whereby a husband undertakes not to maltreat his wife, to keep her comfortable, and in default to pay her a fixed monthly sum as maintenance, executed while the complaint of an uncompoundable offence by the brother of the wife was pending against the husband is not bad in law, even if the complaint was dismissed by the Magistrate on hearing that the com-

promise was effected, provided the dismissal of the complaint was not made contingent upon the execution of the deed of compromise and the compromise was arranged and effected independently of the criminal case. [p. 436, col. 1.]

Ghulam Mohi-ud-din v. *Deoki Nand*, 22 Ind. Cas. 393; 39 P. R. 1914; 54 P. L. R. 1914; 57 P. W. R. 1914, applied.

Karam Chand v. *Basant Kuar*, 11 Ind. Cas. 321; 31 P. R. 1911; 192 P. L. R. 1911; 236 P. W. R. 1911, distinguished.

Second appeal from a decree of the Senior Subordinate Judge, Amritsar, dated the 13th July 1923.

Lala *Nawal Kishore*, for the Appellant.

Mr. *K. J. Rustomji*, for the Respondent.

JUDGMENT.—The facts giving rise to the suit out of which the present appeal has arisen are few and simple. The plaintiff is admittedly the wedded wife of defendant Feroze Din. Owing to certain differences between the husband and wife the latter left the former's house and went to reside with her own people. She carried away her infant daughter with her. The people of the brotherhood intervened and brought about a compromise beween the parties in consequence of which a deed of compromise was written by the defendant, on the 10th June, 1921, undertaking to keep the plaintiff comfortable and not to ill-treat her and in case of default he agreed to pay Rs. 14 per mensem by way of maintenance. The present suit was lodged for recovery of Rs. 98, the arrears of maintenance for seven months. The suit was resisted on the ground that the defendant had not maltreated his wife and that she had left him without justification and that in any case the agreement was bad in law according to the provisions of s. 23 of the Contract Act inasmuch as it had been executed in consideration of a compromise to withdraw a complaint relating to an uncompoundable offence alleged to have been committed by the defendant. It appears that Feroze Din, defendant, took away the daughter from the possession of his wife. Thereupon the wife's brother filed a complaint under s. 363, Indian Penal Code. That complaint was pending at the time the agreement dated the 10th June, 1921, was executed. The complaint was subsequently ordered to be filed on the 18th June 1921. Two issues were framed by the Trial Court upon the pleadings, namely,

(1) Has the defendant been treating the plaintiff with harshness?

(2) Was the agreement executed under undue influence and in consideration of withdrawal of criminal prosecution under s. 363, Indian Penal Code?

The first issue was decided in favour of the plaintiff and against the defendant. Under the second issue the Trial Court held that the agreement was bad in law. For this decision the Trial Court relied on the ruling in *Ghulam Mohi-ud-din* v. *Deoki Nand* (1). The plaintiff's suit was accordingly dismissed.

On appeal the lower Court disagreed with the Trial Court and held that the case was rather governed by the ruling in *Karam Chand* v. *Basant Kuar* (2), then by the rule laid down in *Ghulam Mohi-ud-din* v. *Deoki Nand* (1). The crucial question to be decided in the case was whether the agreement had been executed in consideration of a compromise to withdraw the prosecution. That question was a question of fact which had to be determined upon the evidence in the case. The lower Appellate Court after considering the evidence bearing on the question has come to the conclusion that the compromise was brought about by the brotherhood independently of any idea of the withdrawal of the complaint. In fact the lower Appellate Court has categorically found that the Magistrate filed the complaint only after being informed that the dispute between the parties had been amicably settled through the intervention of the brotherhood.

Having regard to the facts found by the lower Appellate Court the ruling in *Karam Chand* v. *Basant Kuar* (2) is applicable and not that reported as *Ghulam Mohi-ud-din* v. *Deoki Nand* (1). The learned Judges, who decided the latter case, are reported to have observed on page 141* of the report as follows :—

"In *Karam Chand* v. *Basant Kuar* (2), it would appear from the judgment that Sardar Kalwant Singh, who executed the mortgage-deed there sued upon, had executed and handed over the deed to the mortgagee before the criminal prosecution launched by the latter against him was terminated by the complaint being dismissed in default. The completion of the contract of mortgage by the delivery of the deed

(1) 22 Ind. Cas. 393; 39 P. R. 1914; 54 P. L. R. 1914; 57 P. W. R. 1914.

(2) 11 Ind. Cas. 321; 31 P. R. 1911; 192 P. L. R. 1911; 236 P. W. R. 1911.

*Page of P. R. 1914—[*Ed.*]

to the mortgagee was not made contingent upon the complaint being dismissed or the mortgagor being discharged by the Magistrate; the mortgage was completed and the deed was handed over to the complainant independently of the result of the criminal prosecution, though the necessary consequence of the complainant being satisfied once the deed of mortgage was executed in his favour was that he did not appear in the Magistrate's Court and, therefore, the complaint was dismissed in default."

The facts in the present case according to the finding of the lower Appellate Court are very much similar. It is not mentioned in the agreement that the brother of complainant would withdraw the complaint against the defendant if the latter agreed to the terms mentioned in the agreement. According to the finding of the lower Appellate Court the agreement was arrived at independently of the criminal case. In this view the judgment of the lower Appellate Court must be held to be right. The learned Vakil for the defendant has, however, contended that the lower Appellate Court should have recorded a finding upon issue No. 1 also. The decision of the First Court on this issue was against the defendant and it does not appear that this question was ever raised on behalf of the defendant in the lower Appellate Court. It was open to him to have supported the judgment of the Trial Court upon that issue under O. XLI, r. 22. No affidavit has been filed or any other proof given to show that this plea was ever urged before the lower Appellate Court.

The appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 445 OF 1924.

December 10, 1924.

Present:—Mr. Justice Brown.

MAUNG DIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MA HNIN ME AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Sale—Registered conveyance—Consideration, passing of, absence of—Burden of proof.

It is not necessary that a person claiming title under a duly registered deed of sale should prove as against a third party that the considerations stated in the deed did pass. [p. 437, col. 1.]

Prima facie when the execution of a deed of conveyance is proved further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass is of no avail to show that the interest which the instrument purported to convey was not conveyed to the purchaser. Such proof is only important, when, taken with other circumstances, it tends to show that the instrument was a mere sham and not intended to convey any interest to the ostensible purchaser at all. [*ibid.*]

Second appeal against a decree of the District Court, Amherst, in Civil Appeal No. 21 of 1924.

Mr. *Thet Tun*, for the Appellants.

JUDGMENT.—The appellants, Maung Din and Maung Htaw, obtained a money decree against Maung Taw and Ma Kin Za. In execution of that decree they attached a house and land. The respondent, Ma Hnin Me, filed a suit for a declaration that this house and land belonged to her. The Trial Court passed orders dismissing the suit with costs. Ma Hnin Me appealed to the District Court and the Distrtct Court passed orders to the effect, that, "This appeal is, therefore, allowed with costs in both Courts."

The original decree-holders have now filed a second appeal in this Court. The house and land in question were in the possession of the judgment-debtor at the time of attachment. The burden of proving title, therefore, rested with Ma Hnin Me; but Ma Hnin Me has proved that by a registered deed of sale, dated the 3rd of August 1921, this property was sold to her by the judgment-debtor.

The Trial Court held that, as Ma Hnin Me is the daughter of the judgment-debtor and did not prove any payment of any consideration for the sale, the sale was a fraudulent one and could not be upheld. The learned Judge of the Trial Court referred to the case of *Tha Dwe* v. *A. L. V. R. S. Allagappa Chetty* (1). In that case the judgment debtor had executed a deed of sale in favour of his brother. It was found, as a matter of fact, that the judgment-debtor's object in executing the deed was to avoid payment of his debts, and it was held in the circumstances that it could be presumed that the sale was a collusive one.

(1) 4 L. B. R. 211.

In the present case, the plaintiff is the daughter of the judgment-debtor, but otherwise the circumstances are entirely different from the circumstances in *Tha Dwe's case* (1). In *Tha Dwe's case*(1), at about the time of the execution of the conveyance, the debt, for which the decree-holders obtained a decree, was being pressed for payment. In the present case the document was executed on the 3rd day of August 1921. The decree-holders did not file their suit for recovery of their money until April 1923, and the promissory note on which they sued, was not executed till February 1922, some six months after the execution of the sale-deed. One witness states that the consideration for this promissory-note was an old debt; but there is no evidence to show that the judgment-debtors were being pressed for the debt at the time of the execution of the sale-deed. As pointed out in the case of *K. Y. K. M. Chetty Firm* v. *S. N. V. R. Chetty Firm* (2), it is not necessary that a person claiming title under a duly registered deed of sale should prove as against a third party that the considerations stated did pass. A passage from the case of *Chinnan* v. *Rama Chandra* (3) cited in *K. Y. K. M. Chetty's case* (2) runs as follows:—

"*Prima facie* when the execution of a mortgage or other conveyance is proved—and here apparently it was proved and not denied by the mortgagee—further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass, is of no avail to show that the interest which the instrument purported to convey was not conveyed to the purchaser. Such proof is only important, when taken with other circumstances, it tends to show that the instrument was a mere sham not intended to convey any interest to the ostensible purchaser at all."

The sale-deed in the present case is proved to be duly executed; there is nothing on the face of it to suggest fraud, and the burden of proving fraud, therefore, rests on the appellants; and it is impossible to hold that, from the circumstances of the present case, fraud can be presumed.

The plaintiff says that her father owed her money, and that that was why the deed was executed. As I have said, the deed was executed six months before the promissory note in execution of which the appellants obtained their decree.

It is not suggested that Burmese Buddhist parents cannot transfer their land to their children, and the only suspicious circumstance in the case is the relationship between the parties. That, by itself, is entirely insufficient to establish fraud. I agree with the District Court that the plaintiff sufficiently established her case.

It has been suggested that the case might be sent back for further evidence: but I can see no ground for that. The defendants were given ample opportunity in the Trial Court of proving fraud.

I dismiss this appeal summarily.

Z. K. *Appeal dismissed.*

(2) 34 Ind. Cas. 125; 12 Bur. L. T. 199.
(3) 15 M. 54; 5 Ind. Dec. (N. S) 387.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1324 OF 1923.
January 22, 1924.
Present:—Mr. Justice Moti Sagar.
NAMAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
GURDITTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Limitation expiring when Court closed—Application for copies made on re-opening of Court—Exclusion of time—Copying Agent, whether agent of person applying for copies.

A Copying Agent, who receives his salary from Government, is not the agent of a litigant for the purpose of receiving applications for the grant of copies. [p. 438, col. 1.]

If the period prescribed for the presentation of an appeal expires on a date on which the Court is closed and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of re-opening of the Court whilst his right of appeal is still subsisting, he is entitled to the benefit of time requisite for obtaining copies and if his appeal be presented before the expiry of that time, it is not barred by limitation. [p. 438, cols. 1 & 2.]

Siyadat-un-nissa v. *Muhammad Mahmud*, 19 A. 342; A. W. N. (1897) 76; 9 Ind. Dec. (N. S.) 225, followed.

Second appeal from a decree of the District Judge, Jullundur, dated the 10th May 1923.

Lala *Badri Dass*, R. B., for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The sole question to be determined in this second appeal is whether the plaintiffs' appeal preferred to the lower Appellate Court was or was not barred by the Law of Limitation. The judgment and decree of the Court of first instance are dated the 28th November 1922. Copies were applied for on the 22nd of December 1922 but the application, which was handed over to the Copying Agent, was not entered in the register till the 2nd of January 1923, when the Court first re-opened after the Christmas vacations. On that date the application was entered in the register as the first application for the year 1923. The copies were delivered to the applicant on the 5th of January 1923 and the appeal was presented to the District Judge on the same date. It is admitted that the application for copies was handed over to the Copying Agent on the 22nd of December—the last working day before the Christmas vacations; but it is argued that the Copying Agent was the agent of the applicant, and that as the application was not entered in the register by the latter till the 2nd of January 1923, it must be considered to have been made on that date and not before. No authority has been cited in support of this contention and I am unable to agree that the Copying Agent, who receives his salary from the Government, is the agent of a litigant for the purpose of receiving applications for grant of copies. In my opinion the application must be deemed to have been presented on the 22nd of December 1922 and the plaintiffs-respondents were entitled to exclude the time spent in obtaining copies from the 22nd of December 1922 to the 5th of January 1923, both days inclusive, under s. 12 of the Indian Limitation Act. I am further of opinion that even if the application is considered to have been made on the 2nd of January 1923, the appeal preferred to the learned District Judge, was not barred by limitation. It has been held in *Siyadat-un-nissa* v. *Muhammad Mahmud* (1) that if the period prescribed for the presentation of an appeal expires on a date on which the Court is closed and if the appellant has not obtained copies of the decrees and judgment before closing the Court and applies for such copies on the date of re-opening of the Court whilst his right of appeal is still subsisting, he is entitled to the benefit of time requisite for obtaining copies and if his appeal be presented before the expiry of that time, it is not barred by limitation. The ruling is exactly on all fours with the present case and I must hold that the appeal presented by respondents in the Court below on the 5th of January 1923 was not beyond time and that there is no force in the contention that the appeal was time-barred.

On the merits, the judgment of the lower Appellate Court appears to be perfectly correct and there are no grounds for interference. Section 23 of the Indian Easements Act provides that a dominant owner may from time to time alter the place and mode of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. In the present case, the old well having fallen into disuse, a new well has been constructed and the plaintiffs only wish to employ the previously existing water-course to carry the water of this well for the purpose of irrigating his lands. The test to be applied is to see whether any additional burden has been imposed on the servient heritage of the defendants by use sought to be made of the water-course by the plaintiffs. The learned District Judge has found that no additional burden has been imposed and this finding being clearly one of fact cannot be impugned in second appeal.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 19 A. 342; A. W. N. (1897) 76; 9 Ind. Dec. (N. S.) 225.

ALLAHABAD HIGH COURT.

MISCELLANEOUS REFERENCE No. 119 OF 1924.

May 13, 1925.

Present:—Mr. Justice Mukerji.

In the matter of JAUNPUR SUGAR FACTORY LTD.—LIQUIDATORS.

Contract Act (IX of 1872), ss. 31, 32, 33, 51—Company—Agreement to take shares in Company subject to condition precedent—Condition not fulfilled—Winding up—Agreement, whether binding—Precedents, value of.

Precedents are useful only so far as they lay down the law; they are usually not safe guides when questions of fact are involved. [P. 41, col. 1.]

Where a person agrees to take shares in a Company and a condition precedent is attached to the purchase, the purchase is not effective and does not make the would-be purchaser a member of the Company and liable to pay for the shares till the condition is fulfilled. Where, however, the condition attached to the purchase is a condition subsequent, the would-be purchaser becomes a member of the Company although the subsequent condition is not fulfilled. [p. 441, col. 1.]

Motilal Chunnilal v. *Thakorlal Chimanlal*, 16 Ind. Cas. 696; 36 B. 557; 14 Bom. L. R. 648, *Elkington's case*, (1867) 2 Ch. 511; 36 L. J. Ch. 593; 16 L. T. 301; 15 W. R. 665 and *In re Southport and West Lancashire Banking Co. Fisher's case*, (1886) 31 Ch. D. 120; 55 L. J. Ch. 497; 53 L. T. 832; 34 W. R. 49, 335, relied on.

Where a person agrees to become a member of a Company by purchase of shares on condition that he is appointed the sole agent of the Company at a particular place for sale of the commodities manufactured by it; the agreement on his part to take shares is "contingent", that is, it is dependent for its validity and enforcement on the condition of the Company appointing him its sole agent. Where the Company either declines or fails to fulfil the condition and then goes into liquidation whereby the fulfilment of the condition is made impossible, the agreement cannot be enforced against the would-be purchaser at all. [p. 442, col. 2.]

Mr. *Indu Bhushan Banerji*, for the Liquidators.

Dr. *K. N. Katju*, for the Objectors.

JUDGMENT.—The liquidators of the Jaunpur Sugar Factory Limited in liquidation have placed, for the decision of the Court, the objection on the part of the Firm Lallu Mal, Ram Chunder to be put on the list of contributaries.

The case of Lallu Mal as stated in his Counsel's letter addressed to the Official Liquidators is briefly as follows:—

"An agent of the Jaunpur Sugar Factory Limited by name of Simeon approached the sole proprietor Ram Chunder in Company of a broker, Lachmi Narain, with a view to Ram Chunder's purchasing some shares in the Company which had just been started. Ram Chunder trades in sugar and other commodities and he cared more for the profits that might accrue to him by sale of sugar than for any dividend which the Company might declare later on. He stipulated with Simeon that he would purchase the shares on condition that he was appointed the sole agent of the Company for sale of sugar in Cawnpore. To this Simeon agreed and accordingly Ram Chunder signed the application for 500 shares and paid the deposit money of Rs. 500 at the rate of Re. 1 per share. This was on the 20th of February 1921. Later on the Company gave information to Ram Chunder of the fact that 500 shares had in fact been allotted to him and called upon him to pay Rs. 2 more per share which was payable on allotment. Ram Chunder declined to pay anything till the question of agency was settled. Later on the Company made the first call of Rs. 2 per share and this too Ram Chunder declined to pay on the grounds already mentioned." Ram Chunder's contention, therefore, is that his purchase of shares was conditional on his being appointed the sole agent for sale of sugar in Cawnpur and that the Company having failed to appoint him the sole agent, he is not bound to carry out his promise.

The liquidators have not filed any written statement, but their case has been put something like this by their learned Counsel Mr. Indu Bhusan Banerji, who has argued their case extremely well. The Company say: "We told Ram Chunder 'take shares we will give you agency.' We could not give Ram Chunder any agency at the time because no terms had been settled and no sugar was actually being manufactured at the time. We promised to give him agency and would have given him the agency if we had manufactured sugar and if the terms had been settled upon. The condition attached to Ram Chunder's purchase of shares was a condition 'subsequent' and the failure of the 'subsequent' condition does not entitle Ram Chunder to back out of the promise."

The question that has to be decided is primarily a question of fact, *viz.*: What was the agreement between the parties?

The evidence on this point consists of certain letters exchanged between the parties and the testimony of Ram Chunder and the broker Lachmi Narain. Before examining the evidence I may state at once that there is a certain document "Ex. F" which, if accepted as trustworthy, would at once decide the case in favour of Ram Chunder. But I feel considerable difficulty in accepting the document as trustworthy. It appears that Messrs. Behari & Co., were the Managing Agents of the Sugar Factory. No evidence has been adduced to this effect, but it appears to be the case that one Mr. S. M. Bose was one of the moving spirits of Behari & Co. The document Ex. F purports to be a letter from Bose bearing date 11th of April 1921 by which, it is said Bose confirmed the undertaking given by Simeon to Ram Chunder that Ram Chunder's purchase was conditional on his being appointed agent at Cawnpore and

that if the contract of agency fell through, the purchase of shares by Ram Chunder would be treated as cancelled. It has been proved that the document was signed by Bose. But throughout the correspondence between the parties we never hear of this letter. Lachmi Narain, the broker, says that he was told that Bose was staying in the Civil and Military Hotel at Cawnpur and he went and saw him and obtained the letter Ex. F. Ram Chunder had to explain the reason why this letter was never mentioned in the correspondence and was not even mentioned in his Counsel's letter addressed to the liquidators. The explanation was put forward through the mouth of Lachmi Narain. The latter said that he kept the letter with himself simply because he was a relation of Ram Chunder and it mattered little whether the document remained with him or with Ram Chunder. The relationship that is supposed to exist between Ram Chunder and Lachmi Narain is this that the paternal uncle of Lachmi Narain's wife was married in Ram Chunder's family. Needless to say that I entirely disbelieve Lachmi Narain as to how he obtained Ex. F and I accept Mr. Indu Bhusan Banerji's suggestion that the letter was obtained from Bose after the present question of contribution by Ram Chunder had started.

Discarding then Ex. F, there is enough in the correspondence and statement of Ram Chunder to show that Ram Chunder wanted to have the sole agency at Cawnpore and he agreed to purchase the shares only because he was told that he could not be appointed an agent without purchase by him of 500 shares. Oral testimony of what happened in February 1921 when given in May 1925 is bound to be hazy and somewhat indefinite and we have to remember this in examining the evidence of Ram Chunder and Lachmi Narain. Ram Chunder says that two gentlemen dressed in European costume went to him with Lachmi Narain for sale of shares. Then says Ram Chunder: "I told the *Sahabs* that I wanted agency and I wanted to sell sugar. The *Sahabs* said that they would give me the agency. The *Sahabs* told me that I would get my agency if I purchased 500 shares." Further on he says "If the *Sahabs* had not offered me the agency I would not have agreed to purchase any shares." In cross-examination he said "The *Sahabs* told me that I could get the agency only by purchase of 500 shares and not otherwise." This statement on oath of Ram Chunder is supported by the copy of his letter he wrote on receipt of notice of allotment Ex. I. The letter which has been marked as Ex. A acknowledges the allotment letter and goes on as follows:—

"In the meantime we would point you out that our application for the shares was on condition of your agency in Cawnpur being given to us, but we regret that we have not yet been favoured with the rules thereof. We shall feel obliged if you will let us know if the Company is prepared to grant us the agency and send us the rules to see if they are agreeable to us. We can take the shares only if we are able to get the agency."

It is common ground that Ram Chunder declined to pay the allotment money of Rs. 2 per share. Evidently, this conduct on his part supports his case. In reply to Ex. A, which does not bear any date, but which was probably written on the 6th of March 1921, the Company wrote on the 14th of March 1921. This is Ex. J. They said: "We have registered your name for the above agency and shall be glad to offer you our terms and conditions regarding the same when we are able to produce our manufacture of sugar in the market which will probably be in July next. Please write to us on the subject then." It will be noticed that the Company's answer was not a fair and honest answer, to Ram Chunder's letter. Later on the Company made the first call of Rs. 2 per share and wrote the letter Ex. K, dated the 9th of August 1921 to the Firm of Lallu Mal-Ram Chunder. The firm again replied on the same terms as before. They said among other matters "Will you kindly let us know if your mill has commenced manufacturing sugar and whether you have decided finally to appoint us sole agents at Cawnpore for the same. Unless we are placed in a clear position on this subject we regret we cannot make further remittances. The Company's reply (Ex. L, dated 3rd September 1921) was again as evasive and non-committal as before. Behari & Co. purported to offer the terms of agency but without entering into any details. They said that the Firm Lallu Mal-Ram Chunder would have to undertake to purchase a certain quantity of sugar per year, but did not mention what that quantity would be. Then they said that Lallu Mal-Ram

Chunder would be required to make a certain deposit per maund for sugar delivered to them, but here again they did not mention what the amount of deposit would be. It is clear that the Company were avoiding coming to any definite terms as to the question of agency.

It is clear to my mind that Mr. Simeon the Agent of the Sugar Company agreed that as a condition precedent to Lallu Mal-Ram Chunder becoming subscribers to 500 shares they would be appointed the sole agents at Cawnpore for sale of sugar. This agreement on the part of Simeon was impliedly ratified by Behari & Co. by not disputing the correctness of the statement contained in Lallu Mal-Ram Chunder's letter dated the 6th of March 1921 (Ex. A.)

Now the question is what is the position in law of the parties. Mr. Indu Bhusan Banerji argued that the appointment of Lallu Mal-Ram Chunder as agents of the Company was not a condition 'precedent' to the former's purchase of shares and he relied upon three cases—two English and one Indian. These are *Motilal Chunilal* v. *Thakorlal Chimanlal* (1), *Elkington's case* (2) and *In re Southport and West Lancashire Banking Co., Firher's case* (3). I have considered all the three cases and it appears to me that all that they lay down is this; where persons agreeing to take shares have attached to it a condition 'precedent' to their purchase, the purchase is not effective and does not make the would-be purchaser a member of the Company till the condition is fulfilled. Further, where the condition attached to the purchase is a subsequent condition, the would-be purchaser becomes a member although the subsequent condition be not fulfilled. Authorities are useful only so far as they lay down the law, but they are usually not safe guides when questions of fact are involved. In *Elkington's case* (2), it appears that Elkington & Co. applied for 150 shares of £ 10 each in a Company on the faith of an agreement with a promoter (the agreement was subsequently ratified) that they should pay only 30 *s.* per share in cash and the further calls should be set off against the goods to be supplied by them. Elkington & Co. paid a deposit of 10s per share and the shares were allotted to them and then they paid the further sum of 20 *s.* per share. They received the certificates and they were entered on the register No goods were ordered because the Company had to be wound up. The question then arose whether Elkington & Co. were liable to be put on the list of contributaries or not. It was held that they were liable. Dealing with the position of Elkington & Co. the facts and law were discussed and the Lord Justices hearing the appeal differed from the Vice-Chancellor (who had heard the case in the first instance) as to the position of Elkington & Co. They pointed out that, as a matter of fact, Elkington & Co. had agreed to become members of the Company and the condition that was attached as to purchase by the Company of the goods of Elkington & Co. was, as a matter of fact, not a condition precedent. Lord Justice Cairns says at page 526*: "Therefore, of the two questions which seem to me to represent the two alternative views of the case, I am bound to answer in the affirmative the one which suggests that Elkington & Co. intended to be share-holders *in præsenti*. If that is so, that is enough for the present application." At page 525* the same Judge said: "Now, I am not prepared at all to say that it would not have been perfectly competent for Elkington, on receiving the letter of allotment, to have returned it to the Company, and to have said, "there is a complete misunderstanding in sending us this letter of allotment; referring to the correspondence that has passed between your promoter and ourselves, you will find that, although we went through the form of applying for shares the whole of that was subject to the understanding, that either you should give us a resolution of the Company that we were to be under no liability upon these shares, or that we should have a right of refusing to take shares upon which we were to be liable.' They did nothing of the kind. They received the letter of allotment, they kept it." It is clear that the case was decided on a question of fact. So every case must be decided, mainly on the question of fact.

It is rather curious that none of the learned Counsel for the parties ever thought of referring to the Indian Law on the question. English Law is certainly useful in clearing up obscure points, but it is after all the Indian Law that matters most.

(1) 16 Ind. Cas. 696; 36 B. 557; 14 Bom. L. R, 648.

(2) (1867) 2 Ch. 511; 36 L. J. Ch. 593; 16 L.W. 301; 15 W. R. 665.

(3) (1886) 31 Ch. D. 120; 55 L. J. Ch 497; 53 L. T. 832; 34 W. R. 49, 335.

*Pages of (1867) 2 Ch.—[*Ed.*]

It is conceded by the parties that there is nothing in the Companies Act itself which would differentiate the case from ordinary cases of contract. That being so, in my opinion, the law in India would be found in ss. 31, 51, and allied sections of the Contract Act. Section 31 defines a "contingent contract" as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. Section 51 lays down the rule as to performance of reciprocal promises, in the following terms. "When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise." Section 34 of the Contract Act lays down "If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies."

In the case before me the agreement was that Ram Chunder would become a member of the Company by purchase of shares in case he happened to be appointed the sole agent of the Company for sale of sugar at Cawnpore. Under s. 31 of the Contract Act such a contract would be a contingent contract and under s. 32 of the same Act the contract could not be enforced unless and until that event happened. Further, where as in this case, that event became impossible by the Company going into liquidation, under s. 33, the contract cannot be enforced at all. Even if we treat the agreements of the parties as reciprocal promises we shall see that Ram Chunder was under no legal liability to perform his part of the contract unless and until the Company were ready and willing to perform their promise, *vide* s. 51 of the Contract Act. Under the Indian Law, therefore, the Company having failed to appoint Ram Chunder their sole agent, Ram Chunder is absolved from his liability to become a member of the Company. It has been pointed out that at the time of the agreement with the Firm of Lallu Mal-Ram Chunder it was known to the parties that the Company was not, as a matter of fact, manufacturing any sugar and it is also common ground that the terms of the agency had not yet been settled when Ram Chunder signed the application for shares. From these facts it is argued that the circumstances were such that Lallu Mal-Ram Chunder knew that they could not at all be appointed agents. I do not agree with this contention. There was nothing in law to prevent the Company from appointing Lallu Mal-Ram Chunder their sole agents in Cawnpur by settling the terms although sugar was not being manufactured at the time. The agrement would have been that if and when sugar was produced in the Factory Lallu Mal-Ram Chunder would be the only firm which would sell sugar manufactured by the Company at Cawnpur. The terms were not settled but there is no reason why they could not be settled at once and if they could not be settled it was clear that the agreement on the part of Ram Chunder to take the shares would fail through at once.

I hold, therefore, that in terms of the English Law it was a condition 'precedent' to Lallu Mal-Ram Chunder becoming a member of the Company that they should be appointed the sole agents of the Company for sale of sugar at Cawnpur. In the language of the Indian Contract Act the agreement on the part of Lallu Mal-Ram Chunder to become a member of the Company was 'contingent,' *i.e.*, dependent for its validity and enforcement on the condition of the Company appointing them their sole agents. In the events that have happened the Company either declined or failed and later made it impossible to appoint Lallu Mal-Ram Chunder their sole agents and it would follow that Lallu Mal-Ram Chunder are not liable to contribute towards the liquidation.

I allow the objection of Ram Chunder, the proprietor of Lallu Mal-Ram Chunder with costs. The liquidators are not to be blamed for having contested Ram Chunder's application, for the matter was not entirely clear and a good deal could be fairly said on behalf of the liquidators. The liquidators will get their costs out of the estate and I assess the Counsel's fees of the liquidators as between Counsel and client at Rs. 75.

Z. K. *Objection allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 186 OF 1924.

March 23, 1925.

Present:—Mr. Daniels, J. C.

RAGHUBAR DAYAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KANHAIYA BUX AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Pre-emption suit—Plaintiff impugning correctness of price entered in sale-deed—Valuation of suit—Suit filed in proper Court—Return of plaint for presentation to another Court—Limitation, extension of.

Where in a pre-emption suit the plaintiff alleges that the price entered in the sale-deed is not fixed in good faith, the suit would be valued according to the market value of the property. [p. 444, col. 1.]

Sheodat Singh v. *Bishunath Singh*, 6 O. C. 255 and *Kishen Dyal* v. *Raja Singh*, 1 Ind. Cas. 687; 12 O. C. 31, followed.

Where a pre-emption suit is filed in the proper Court within limitation but owing to a mistake of the Court itself the plaint is returned to the plaintiff for presentation to another Court and the latter Court again returns the plaint for presentation to the former Court and the plaint is finally re-presented to the first Court after the expiry of the period of limitation, the plaintiff is entitled to the benefit of the provisions of s. 14 of the Limitation Act and the suit must be treated as having been filed within limitation. [p. 443, col. 2.]

Second appeal against a decree of the District Judge, Fyzabad, dated the 1st and 2nd January 1924, confirming that of the Subordinate Judge, Sultanpur, dated the 25th September 1923.

Mr. *Naim Ullah*, for the Appellants.

Mr. *H Husein*, for the Respondents.

JUDGMENT.—This is an appeal from a decree dismissing a pre-emption suit as barred by limitation. The history of the case is remarkable, and I should hope unprecedented. The case was originally filed on 23rd September 1923, and was numbered Suit No. 111 of 1922. The price fixed in the sale-deed was Rs. 3,000. The allegations in the plaint were that Rs. 1,000 of this was fictitious, that Rs. 1,950 had been left with the vendee for payment of debts which he had not paid, and that only Rs. 50 had actually been paid to the vendee. He claimed pre-emption on payment of this amount of Rs. 50, though under s. 12 of the Oudh Laws Act, he ought, as he alleged the valuation in the sale-deed to be fictitious, to have claimed pre-emption on the market price, which he asserted to be Rs. 500. The Subordinate Judge framed an issue as to the market-value of the property, and holding that it was under Rs. 1,000 returned the plaint on 17th November 1922 for presentation to the proper Court. These proceedings are not on the record which has been submitted to this Court, but the respondent has produced a certified copy of the orders passed. The plaintiff presented his claim the same day before the Munsif. As this particular *pargana* was then under the jurisdiction of the Additional Munsif it was returned to the plaintiff and presented the next day to the latter. For some reason which does not appear on the record it was again sent back by the Additional Munsif on 12th March 1923 and ultimately on 3rd April 1923 was at the plaintiff's request, returned to him for presentation to the Subordinate Judge to whom he again presented it the same day.

Both parties are now agreed that on the allegations in the plaint it is the Subordinate Judge who has jurisdiction to try the suit. In the plaint as it now stands the plaintiff definitely contends that he claims pre-emption on payment of Rs. 2,000. This sentence was added after the plaint was originally prepared as is obvious on an examination of the plaint itself. Respondent alleges that it was added after the plaint was returned for the second time, and though the plaintiff does not admit this I think it not unlikely. The sentence, however, only makes clear what is already implied in para. 4 of the plaint. The plaintiff only asserted that Rs. 1,000 out of the consideration money was fictitious. He asserted that Rs. 1,950 consisted of debts, which under the terms of the sale-deed the vendee had to pay and had not paid, but he did not deny the genuineness of these debts.

Both the Courts below have dismissed the suit on the ground that the plaint when presented for the second time to the Subordinate Judge was beyond time and that the plaintiff is not entitled to the benefit of s. 14 of the Limitation Act. The order of the learned District Judge is based on an extraordinary mistake as to the facts of the case. The learned District Judge says that the plaintiff stated the market-value of the property to be Rs. 50 only, and this was such an obvious under-valuation that it could not possibly have been made in good faith. The value which the plaintiff had actually put on the property in para. 5 of his plaint was not Rs. 50 but Rs. 500. This mistake cuts away the entire basis of

the learned District Judge's reasoning. On the admissions of the parties themselves the plaint was rightly presented before the Subordinate Judge in the first instance and ought never to have been returned by him. Owing to this mistake of the Court itself the plaintiff has been driven from Court to Court for a period of between six to seven months, and when he does finally get his case back into the right Court, that Court proceeds to dismiss it on the ground of limitation. This is on the assumption made by the parties and accepted by the Subordinate Judge that the suit should be valued on the amount which the plaintiff admitted to be the true sale consideration. In view of the ruling in *Sheo Dat Singh* v. *Bishunath Singh* (1) which was accepted as good law in *Kishen Dyal* v. *Raja Singh* (2), I am disposed to think that the suit should have been valued according to the market-value of the property. In any case, however, I now direct that the suit be tried by the Subordinate Judge.

The decrees of the Courts below are erroneous and must be set aside. There is no ground for imputing to the plaintiff either bad faith or want of due diligence. I allow the appeal and setting aside the decrees of the Courts below return the case to the learned Subordinate Judge for disposal on the merits.

Costs will abide the result. I may add that the records have been sent up to this Court in a very incomplete form. The record containing the preliminary issue framed by the Subordinate Judge is not here. The District Judge will please report after enquiries why these proceedings have been kept on a separate file and why they were not sent up with the records in appeal.

Z. K. *Appeal allowed.*

(1) 6 O. C. 255.
(2) 1 Ind. Cas. 687; 12 O. C. 31.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1323 OF 1924.
May 22, 1925.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

Srimati JAGAMAYA DASI—PLAINTIFF—APPELLANT
versus
Musammat TULSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 10—Sale of house—Pre-emption, suit for—Limitation, commencement of—Transfer of Property Act (IV of 1882), s. 40—Lease containing covenant for pre-emption—Transferee taking with notice of covenant, whether bound.

Where land is leased for building purposes and the lease contains a covenant giving the lessor a right of pre-emption in case of a sale of the buildings erected on the land, the right of pre-emption can be enforced against a purchaser of the buildings who takes with notice of the covenant contained in the lease. [p. 445, col. 1.]

Gopi Ram v. *Joet Ram*, 82 Ind. Cas. 646; 21 A. L. J. 430; 45 A. 478; (1923) A. I. R. (A.) 514, referred to.

Basdeo Rai v. *Jhagru Rai*, 83 Ind. Cas. 390; 22 A. L. J. 265; 46 A. 333; (1924) A. I. R. (A.) 400; L. R. 5 A. 161 Civ. and *Mohammad Jan* v. *Fazluddin*, 85 Ind. Cas. 482; 22 A. L. J. 400; 46 A. 514; (1924) A. I. R. (A.) 657; L. R. 5 A. 761 Civ., followed.

Where the subject of a sale by its nature admits of physical possession, the ability or the inability of the vendor to place the vendee in actual possession of the property sold is not material for the purpose of applying Art. 10 of Sch. I to the Limitation Act to a suit for pre-emption of the property. [p. 445, col. 2.]

In such a case limitation does not begin to run till possession is actually delivered to the vendee. The transfer of physical possession may take place at the time of the sale or at some time later. But if the property admits of physical possession, limitation does not start till physical possession is actually taken. [*ibid.*]

A house is capable of being physically possessed within the meaning of Art. 10 of Sch. I to the Limitation Act. [*ibid.*]

Second appeal from a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 21st of July 1924.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The plaintiff is the widow of Babu Amrit Lal Kundoo. On the 22nd February 1891. Buddhu took a lease of a plot of land measuring 3 *biswas* from Amrit Lal Kurdoo for building a house on an agreement to pay a ground rent of Rs. 1-8 per year. The lease provided that in case the lessee transferred the materials of the house built by him on the said land, the lessor shall have a preferential right of purchasing them for "a proper price" and that the transfer to any other person shall be valid only in case the lessor refused to take it.

On the 7th June 1921 the defendants Nos. 2 and 3 who are the legal representatives of Buddhu, one of the original lessees, sold one of the houses built on the land aforesaid to *Musammat* Tulsa for Rs. 150. The house was at that time in the occupation of a tenant *Musammat* Sundar. *Musammat* Tulsa sent a notice to *Musammat* Sundar to vacate the house which she

did on the 13th June 1921, but before *Musammat* Tulsa could take possession of it, Mangru, the son of Buddhu, the original lessee, took possession of the house. A suit was then filed by *Musammat* Tulsa for his ejectment; and she got a decree in execution of which she obtained possession on the 18th July 1922.

The present suit was filed by the plaintiff for pre-emption of the said house on the 2nd July 1923. She relied on the covenant for pre-emption or option of purchrse contained in the instrument of lease and one of the questions raised in the suit was whether the claim was within time. There were other pleas raised in the case, the findings of the Court of first instance on which were in favour of the plaintiff. The suit was, however, dismissed by that Court on the ground that the claim was not within time, inasmuch as it was brought after the lapse of a year from the date of the registration of the sale-deed. The view taken by the lower Appellate Court was that as the house did admit of physical possession, the suit was within time from the date on which *Musammat* Tulsa obtained possession; but it nevertheless proceeded to dismiss the claim because in its opinion the covenant for giving the lessor an option of purchase was not enforceable against the vendee. In support of the latter proposition it relied on the decision in *Gopi Ram* v. *Jeot Ram* (1). The finding of the lower Appellate Court was that the vendee had constructive notice of the covenant of pre-emption embodied in the registered instrument of lease; and that being the case s. 40 of the Transfer of Property Act applied; and as held in *Basdeo Rai* v. *Jhagru Rai* (2) and *Mohammad Jan* v. *Fazluddin* (3), the covenant was enforceable against the vendee. Article 10 of the Indian Limitation Act (IX of 1908) provides a period of limitation of one year for a suit to enforce a right of pre-emption whether founded on custom or contract from the date when the purchaser takes physical possession of the whole property sold or where the subject of the sale does not admit of physical possession when the instrument of sale is registered. The latter clause has reference to the nature of the property which forms the subject of the sale; for as held in *Chandan Singh* v. *Chandi Prasad* (4), if the subject of the sale by its nature admits of physical possession the ability or inability of the vendor to place the vendee in actual possession of the property sold is not material and limitation does not begin till the possession is delivered. In *Batul Begam* v. *Mansur Ali Khan* (5), it was held by this Court that a share in an undivided *zemindari mahal* was not susceptible of physical possession within the meaning of Art. 10 of the Indian Limitation Act, and constructive possession for example by the receipt of rent from tenants was not physical possession within the meaning of that Article. That decision was upheld by their Lordships of the Privy Council in *Batul Begam* v. *Mansur Ali Khan* (6). Their Lordships there pointed out that the corresponding Article in Act XIV of 1859 provided a period of limitation of one year from the date of "possession" which was altered in 1871 to "actual possession" and that in 1877 the word "physical" was deliberately substituted for "actual" for a restrictive purpose. They observed that "actual possession," as applicable to an undivided share in a *mahal* was not possible and that the words "physical possession" could only be deemed to imply personal and immediate possession, regard being had to the form in which the property may exist at the time of the sale. It can hardly be disputed that a house or a shop is capable of physical possession. Article 10 provides that in the case of such property, that is property capable of physical possession the limitation is computed from the date when the purchaser takes under the sale sought to be impeached physical possession of that property. The transfer of physical possession may take place at the time of the sale or at some time later; but if the property admits of physical possession the limitation does not start till the physical possession is actually taken. The question is not free from difficulty; but on a careful consideration of the two clauses as a whole we are inclined to think that the rule applicable to property such as on undivided share

(1) 82 Ind. Cas. 646; 21 A. L. J. 430; 45 A. 478; (1923) A. I. R. (A.) 514.

(2) 83 Ind. Cas. 390; 22 A. L. J. 265; 46 A. 333; (1924) A. I. R. (A.) 400; L. R. 5 A. 161 Civ.

(3) 85 Ind. Cas. 482; 22 A. L. J. 400; 46 A. 514; (1924) A. I. R. (A.) 657; L. R. 5 A. 761 Civ.

(4) A. W. N. (1888) 227.

(5) 20 A. 315; A. W. N. (1898) 61; 9 Ind. Dec. (N. S.) 562.

(6) 24 A. 17; 28 I. A. 248; 5 C. W. N. 888; 3 Bom. L. R. 707; 8 Sar. P. C. J. 133 (P. C.).

in a *mahal* which is not by its nature capable of physical possession cannot be applied to houses and shops over which physical possession is always possible and practicable. The vendee here attempted to take physical possession but found that the house was occupied by a trespasser whom she was unable to eject till the 18th July 1922. From that date the suit was within time.

The appeal is, therefore, allowed and the claim of the plaintiff decreed subject to the payment of Rs. 150 into the Court of first instance within three months from this date. In case of payment the plaintiff shall get her costs here and below from the defendant including fees in this Court on the higher scale. In case of non-payment the suit will stand dismissed and the defendant-vendee will get her costs from the plaintiff in all Courts including fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 44-B OF 1924.

April 18, 1925.

Present:—Mr. Findlay, A. J. C., and Mr. Wadegaonkar, A. J. C.

MESSRS. BRUEL AND CO., BOMBAY — APPLICANTS

versus

KESHEORAO AND OTHERS—PLAINTIFFS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10, O. XXII, r. 10—Transfer of Property Act (IV of 1882), s. 91—Mortgage suit—Attachment of mortgaged property—Attaching creditor, whether entitled to redeem—Right of attaching creditor to be impleaded as party to mortgage suit.

An attachment creates no lien or title in favour of the attaching creditor but simply prevents alienation of the property attached. [p. 447, col. 1.]

Moti Lal v. *Karrabuldin*, 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.) and *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*, 26 M. 673, followed.

Consequently an attaching creditor has no right under O. XXII, r. 10, C. P. C., to be joined as a party to a mortgage suit relating to the property attached. [*ibid.*]

Under s. 91 of the Transfer of Property Act an attaching creditor has a right to redeem a mortgage relating to the attached property and he has a right to be joined as a defendant to a suit to enforce a mortgage of the attached property for the purpose of redeeming the mortgage sued upon. [*ibid.*]

Revision against an order of the Second Additional District Judge, Akola, dated the 28th January 1924, in C. S. No. 18 of 1923.

Mr. *G. G. Hatwalne*, for the Applicants.

Messrs. *M. Gupta*, *M. B. Kinkhede*, R. B., *M. R. Indurkar* and *M. B. Niyogi*, for the Non-Applicants.

ORDER.—On 31st August 1923, the sons of the late Gopal Rao Buti of Nagpur instituted a suit in the Court of the Second Additional District Judge, Akola, (Suit No. 18 of 1923) against the Directors of the Berar Oil Works Company Limited and certain other persons for Rs. 6,56,171-5-9 with future interest. They asked for a decree for recovery of this sum by sale of the property pledged with their father under an agreement dated the 13th May 1920 by the Directors of the Berar Oil Works Company and further prayed that if the sale-proceeds of the pledged property were found insufficient to satisfy their debt, the balance should be realised by sale of the property equitably mortgaged with their father by the deposit of certain title-deeds under an equitable mortgage executed on the same date (13th May 1920). This was eventually compromised between the parties who on 18th January 1924 filed a petition embodying the terms of the compromise and requested the Court to pass a decree in accordance therewith. Accordingly, a decree was passed on 28th January 1924 in terms of the said compromise.

It appears that a few days before the above decree was passed *i. e.*, on 22nd January 1924 the present petitioner made an application to the Court below requesting the said Court to join him as a defendant in the suit on the ground that he was an attaching creditor of the Berar Oil Works Company Limited, having attacheds, the entire immoveable property of that Company on 13th December 1923 in execution of his decree obtained against the said Company from the Bombay High Court. In his application, he alleged that the compromise entered into between the parties to the suit was against law and equity and could not be upheld as it did 'not seem to have been properly sanctioned by proper persons on behalf of the Company.' He further alleged that he wanted to contest the legality of the equitable mortgage on the basis of which plaintiffs had instituted their suit. On 28th January 1924 he made a fresh appli-

cation in which he mentioned an additional ground for being impleaded as a defendant. His application was, however, rejected by the Court below which passed a decree in terms of the compromise referred to above. He has now come up in revision and he requests this Court to set aside the order of the lower Court rejecting his application and to direct that he be joined as a defendant in the suit.

It is urged on behalf of the petitioner that as interest was created in his favour in the property which was the subject-matter of the suit during the pendency of the suit by reason of the attachment of that property effected at his instance on 13th December 1923, and he was entitled to be impleaded as defendant in the suit under O. XXII, r. 10 of the C. P. C. We are of opinion that this contention is unsound. It has been held over and over again that attachment creates no lien or title but simply prevents alienation: *Moti Lal* v. *Karrabuldin* (1) and *Krishnasawmy Mudaliar* v. *Official Assignee of Madras* (2). Consequently, O. XXII, r. 10, C. P. C., has no application in the present case.

It is next urged that the petitioner should, in any case, have been added as a defendant under O. I, r. 10, C. P. C., as he being an attaching creditor had a right to redeem plaintiffs' mortgage. Several authorities have been cited in support of this contention. We do not propose to discuss these authorities as it is, in our opinion, clear that under s. 91 of the Transfer of Property Act an attaching creditor has a right to redeem. But the petitioner did not wish to be added as defendant so that he may have an opportunity to redeem plaintiffs' mortgage. His sole object in asking the Court to add him as a defendant was to challenge the compromise arrived at between the parties to the suit and also the mortgage in favour of the plaintiffs on the ground that it was not a valid mortgage. Under these circumstances, we are of opinion that the Court below exercised its discretion properly in rejecting his application. No case for interference in revision has been made out and we accordingly reject the petition with costs. Pleader's fee Rs. 50.

Z. K. *Petition rejected.*

(1) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.).
(2) 26 M. 673.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 523 OF 1923.
January 25, 1925.
Present:—Mr. Justice Heald and
Mr. Justice Chari.

MA KYAW AND ANOTHER—APPELLANTS
versus
MAUNG PO MYIT AND ANOTHER—
RESPONDENTS.

Buddhist Law, Burmese—Succession—Mother's half sister, whether excludes father's cousin.

Under Burmese Buddhist Law a maternal grandmother's daughter from a husband other than the maternal grandfather excludes a paternal grandfather's sister's daughter. [p. 448, col. 2.]

Second appeal against a decree of the District Judge, Prome, in Civil Appeal No. 62 of 1923.

Mr. *N. C. Sen*, for the Appellants.
Mr. *Robertson*, for the Respondents.

JUDGMENT.—This appeal deals with rival claims to the estate of Ma Hla Yin who died unmarried, the rival claimants being Ma Kyaw and Ma Ngwe Nyun (now represented by her daughter Ma Mya Sein) on the one side and Ma Hnaw Za on the other.

Ma Kyaw and Ma Ngwe Ngun were children of Ma Hla Yin's maternal grandmother by a second husband who was not the father of Ma Hla Yin's mother, that is to say, they were half sisters of Ma Hla Yin's mother, while Ma Hnaw Za is a cousin of Ma Hla Yin's paternal grandfather.

It is to be noted that in her written statement Ma Hnaw Za did not expressly claim to inherit Ma Hla Yin's estate on the ground of relationship and the learned Judge in the Trial Court said that it was not disputed that Ma Kyaw and Ma Ngwe Nyun would be the nearest natural heirs if the claim of one Ma Hla Tin who alleged that she was Ma Hla Yin's sister by adoption was not proved. Ma Hnaw Za's claim as embodied in her written statement was rather that she was entitled to the inheritance because she had supported Ma Hla Yin after her father's death, had tended her during her illness, and had buried her when she died, and that Ma Kyaw and Ma Ngwe Nyun had done none of these things, but on the contrary had neglected the ordinary duties of kindred and affection. Ma Hla Tin's claim, as adoptive sister of Ma Hla Yin, has been finally rejected, and so has been Ma Hnaw Za's claim that Ma Kyaw and Ma Ngwe Nyun had by neglect deprived themselves of the right to inherit, but Ma Hnaw Za seems to have

been allowed to raise a new claim that she was entitled to inherit on the ground of relationship.

The lower Appellate Court has found that the claims of the parties on the score of relationship are equally divided, since although Ma Kyaw and Ma Ngwe Nyun were nearer in relationship they were only half-sisters of Ma Hla Yin's mother, while Ma Hnaw Za was a full cousin of Ma Hla Yin's father. It accordingly gave each of them half the estate.

Both sides appeal, each of them claiming the whole estate.

The case resolves itself into the question, who are to be preferred, the mother's half-sister's or father's cousin.

It is a fundamental principle of Burmese Buddhist Law that inheritance shall not ascend if it can possibly descend, and it is a logical corollary of that rule that inheritance must not ascend more than is necessary. An instance of this is to be found in the rule that brothers and sisters exclude grandparents.

It is clear, therefore, that unless there is a rule which excludes half-brothers or half-sisters from the category of brothers and sisters, Ma Kyaw and Ma Ngwe Nyun were entitled to succeed to Ma Hla Yin's estate in preference to Ma Hnaw Za, since as sisters of Ma Hla Yin's mother they would exclude not only their own mother, that is Ma Hla Yin's maternal grandmother, but also Ma Hla Yin's paternal grandfather, through whose sister Ma Hnaw Za now claims.

We have not been referred to any such rule of exclusion in the Burmese Buddhist Law books and we know of none. It is true that in a case of *Taung Mro* v. *Aung Nyun*(1) which was not officially reported, a Single Judge of the late Chief Court remarked that, in his opinion, "full blood relations exclude half-blood relation," but the rule against the ascent of inheritance might have warranted the learned Judge's decision in that particular case, and in the case of *Ma Gyi* v. *Ma Khin Saw* (2), where the rival claimants were on the one side a half brother and a half-sister and on the other a natural grandmother of the owner of the estate and the maternal grandmother relied on that unreported case, a Bench of the Chief Court held that the half-brother and half-sister excluded the maternal grandmother and quoted with approval a *dictum* in the case of *Le Maung* v. *Ma Kwe* (3) to the effect that in a case where there are half-brothers or half-sisters or both and no full brothers or sisters, the half-brothers or half-sisters exclude the parent of the owner of the estate.

In these circumstances we see no reason to believe that Ma Kyaw and Ma Ngwe Nyun ought not to be regarded as sisters of Ma Hla Yin's mother, and we hold that as such sisters they exclude Ma Hnaw Za, who is daughter of sister of Ma Hla Yin's grandfather.

There is no dispute as to the properties of which the estate consists except the cash. The Trial Court accepted the defence that the cash belonging to the estate amounted to Rs. 281-6-0 and that finding has not been questioned in this Court. The lower Courts have also accepted Ma Hnaw Za's valuation of the moveable properties of which the estate consists, and, as no objection has been taken in this Court, we see no reason to interfere. So far as the immoveable property is concerned, it was unnecessary to specify its value in the decree, which should have directed its delivery to Ma Kyaw and Ma Mya Sein.

Ma Kyaw and Ma Mya Sein will have a decree for Rs. 281-6-0 and for possession of the moveable property specified in the Schedule attached to the plaint, or for its value as shown in the Schedule filed at page 19 of the record against Ma Hna Za and her husband, Po Myit. They will also have a decree for possession of the land and house described in the Schedule attached to the plaint.

Ma Hnaw Za and Pa Myit will pay the costs of Ma Kyaw and Ma Mya Sein throughout. We make no order for the costs of Ma Hla Yin and the legal representative of the third defendant, Maung Gauk, who are not parties to the appeal.

Z. K. *Appeal allowed.*

(1) 58 Ind. Cas. 483; 12 Bur. L. T. 103.
(2) 72 Ind. Cas. 4; 11 L. B. R. 460; 1 Bur. L. J. 263; (1923) A. I. R. (R.) 124.
(3) 56 Ind. Cas. 681; 10 L. B. R. 107; 13 Bur. L. T. 3.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 656 OF 1923.

November 6, 1923.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Fforde.

ACHPAL—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 238, 239—Penal Code (Act XLV of 1860), ss. 395, 412—Dacoity—Dishonestly receiving stolen property—Joint trial, legality of—Charge of dacoity—Conviction under s. 412, legality of.

None of the particulars which go to make up the offence of dacoity constitute by themselves the offence of dishonestly receiving stolen property. The offence of dishonestly receiving stolen property cannot, therefore, be considered a minor one as compared with that of a dacoity or of house-breaking by night. A person who has been charged with the offence of dacoity cannot consequently be convicted of an offence under s. 412 of the Penal Code. [p. 450, col. 2.]

The offence under s. 412 of the Penal Code is a totally different offence from that of dacoity committed at a different time and not in the course of the same transaction within the meaning of s. 239 of the Cr. P. C. Therefore, a person cannot be tried in respect of an offence under s. 412 of the Penal Code jointly with other persons who are charged with the offence of dacoity committed at a different time and not in the course of the same transaction. [p. 450, col. 1.]

Appeal from an order of the Sessions Judge, Ambala, dated the 24th April 1923.

Mr. *B. A. Cooper*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Sessions Judge of Ambala convicting Achpal of the offence of dacoity with murder under s. 395, Indian Penal Code, and sentencing him to transportation for life. At the same trial Idu also was convicted under the same section and sentenced to ten years' rigorous imprisonment while Kapura who was charged under ss. 395/109, Indian Penal Code, and tried along with others was convicted and sentenced under s. 412, Indian Penal Code, to five years' rigorous imprisonment. Idu and Kapura were also sentenced to a fine of Rs. 300 each, other persons who were jointly tried with these three were acquitted by the learned Sessions Judge on the ground that the evidence of the two approvers was not corroborated in material particulars as regards them. Achpal's appeal has been argued by Mr. Cooper, Advocate, and Kapura's by Mr. Gullu Ram. Idu's appeal was filed by Counsel but he was unrepresented at the hearing.

The facts of the case including the evidence of the two approvers have been fully set forth in the judgment of the Court below and we need not repeat them. It is not denied that the dacoity in which the two murders were committed took place in the house of Asa Ram in village Sabepur on the night between 30th June 1922 and 1st July 1922. It has also not been denied before us that the two approvers, P. W. Nos. 5 and 9 Nawab and Saini, themselves took part in the dacoity, but it has been urged by Mr. Cooper that their evidence so far as his client is concerned has not been sufficiently corroborated to warrent a conviction. In our opinion there is ample corroboration of the evidence of the approvers as against Achpal. It is in evidence that one of the dacoits was wounded by a spear thrust delivered by Asa Ram at the time of the dacoity. Seven days afterwards Achpal was medically examined and was found to have a wound in the shoulder which could have been caused by a spear. His explanation that it was caused by a bullock's horn has been disproved by the medical evidence. The presence of this injury on his person is in itself, in our opinion, a sufficient corroboration of the evidence of the approvers. But in addition to this three articles of jewellery and a *chuni* (Ex. P. 4) were produced by him during the Police investigation. They have been fully identified by Asa Ram and his female relations as belonging to them as part of the property stolen by the dacoits. The witnesses who identified these articles were not cross-examined as to the question of indentity and there is no evidence of rebuttal. Achpal did not claim them to be his property and we dismiss his appeal.

As regards Idu, five articles of jewellery (Ex. P. 9 (1), P. 9 (2), P. 10, P. 11 and P. 13) are said to have been produced by him or at his instance. Exhibits P. 9(1) and P. (2) were found in possession of *Musammat* Santi, P. W. No. 24 who states that the wife of Idu pawned them to her but did so some six months prior to the dacoity. There is no evidence to show that these articles came into the possession of Idu's wife subsequent to the dacoity. *Musammat* Santi may have falsely stated that they were pawned to her prior to the dacoity but there is no rebuttal of her statement and we cannot read into her evidence what she had not said. As regards the earrings Ex. P. 10, they also are said to have been produced by *Musammat* Santi, but she

pleaded ignorance in regard to them and there is no evidence that they were ever in her possession or that of Idu's wife.

As regards P. 11 and P. 13 it is admitted that they were produced from the house of Idu and at his instance, but Idu and his wife claimed them as their own property, Lal Singh *Lambardar* stated that when the *pariband*, Ex. P. 11 was first produced during the investigation. Asa Ram failed to identify it, but this statement is contradicted by other evidence which we see no reason to reject. Asa Ram and his female relations have given clear evidence of identification of these articles. It is an undoubted fact that Indian women can identify their own articles of jewellery even if they are of a common pattern and we see no reason to reject the evidence of identification which has been produced in present case. Moreover the two approvers have given clear evidence against Idu and there is nothing on the record to show that they had any reason to name him falsely. We consider that his conviction is justified by evidence and dismiss his appeal.

Kapura, as already stated, was tried along with his co-accused for abetment of dacoity. He could so be tried along with them but, in our opinion, it was illegal to convict him of an effence under s. 412, Indian Penal Code, which is a totally different offence from that of dacoity committed at a different time and not in the course of the same transaction within the meaning of s. 239, Cr. P. C. It is quite clear that Kapura could not have been tried upon a charge under s. 412, Indian Penal Code, jointly with others who were being tried for the offence of dacoity under s. 396, his offence being quite distinct and committed on a different occasion. But the learned Sessions Judge was of opinion that he was justified in convicting him under s. 412, having regard to s. 238, Cr. P. C. This latter section lays down that when a person is charged with an offence consisting of several particulars a combination of some only of which constitute a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, although he is not charged with it. The learned Sessions Judge says "dacoity is a composite offence," and the dishonest retention of property stolen in the commission of a dacoity would, I hold, be included in the more comprehensive charge of dacoity or abetment of dacoity.

Here we are unable to agree with the learned Sessions Judge. None of the particulars which go to make up the offence of dacoity constitute by themselves the offence of dishonestly receiving stolen property. Some instances of what is a minor offence within the meaning of this section are as follows :—The offence under s. 365, Indian Penal Code, is a minor offence as compared with that under s. 366; the offence of causing grievous hurt or of causing hurt under s. 325 or 323, Indian Penal Code, is a minor offence as compared with the offence of murder or culpable homicide. But we are quite unable to see how the offence of receiving stolen property can be considered a minor one as compared with that of dacoity or of house-breaking by night. We, therefore, accept the appeal of Kapura and set aside his conviction and sentence.

It remains to consider whether Kapura should be re-tried for an offence under s. 412, Indian Penal Code. The approvers have stated that he was not one of the dacoits but that Sharfu, who is said to have been absconding and the leader of the gang, said that he should have a share of the stolen property because he had organised the gang. This statement of Sharfu made to the approvers has been admitted as evidence against Kapura by the Court below but it was obviously inadmissible in evidence. The only evidence against him is that of Joti P. W. No. 33 a boy of 20 and a shopkeeper of Jagadhari, who produced two ornaments, a *mendhi* and a *kanda* (Exs. P. 15 and P. 16) value at Rs. 20 and Rs. 2-8 respectively, which he said Kapura had sold to him about a month after the dacoity. Joti's evidence is not corroborated by any entry in any book or by any other evidence whatsoever. It is simply his words against Kapura, even if it be assumed that the property be stolen property. It was found in the possession of Joti and it is quite possible that he accused Kapura in order to save his own skin. The case is, therefore, a weak one against Kapura and considering the long time he has been in custody and in Jail, we do not think he should be re-tried. We, therefore, direct that he be released from custody.

Z. K. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 57 OF 1925.

April 2, 1925.

Present:—Mr. Kennedy, J. C., and Dr. DeSouza, A. J. C.

EMPEROR—PROSECUTOR

versus

DODO—ACCUSED.

*Criminal Procedure Code (Act V of 1898), s. 349—Case forwarded to superior Magistrate—Procedure—*De novo *trial, whether necessary.*

When two persons are jointly tried before a Magistrate who being of opinion that he cannot pass a sentence sufficiently severe against one of them forwards the case to a Superior Magistrate under s. 349 of the Cr. P. C., it is desirable that both the accused should be forwarded, though the Superior Magistrate would be competent to try only one of the accused who is actually sent up before him.

Where a case is forwarded to a Superior Magistrate under s. 349 (2) of the Cr. P. C. the Magistrate is not bound to hold a trial *de novo*.

Reference by the Additional Sessions Judge, Hyderabad (Sind).

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—This is a Reference by the Additional Sessions Judge of Hyderabad under the following circumstances.

Three accused persons were tried before the Bench Magistrate Second Class of Tando Mahomed Khan. They were tried for offences under ss. 379 and 411, Indian Penal Code. The Bench held the offences proved against two of the accused persons, Dodo and Bachayo, and not against the third. Accordingly the Bench Magistrates convicted Dodo and sentenced him to suffer rigorous imprisonment for six months and holding that they could not adequately punish Bachayo in view of his previous convictions, forwarded him to the Sub-Divisional Magistrate under s. 349, Cr. P. C.

The learned Sub-Divisional Magistrate without hearing any fresh evidence held upon the evidence recorded by the Bench Court that the accused was guilty and sentenced him to 12 months' rigorous imprisonment in view of the previous convictions against him.

The learned Additional Sessions Judge before whom the appeal came up for hearing was of the opinion that the procedure adopted by the Sub-Divisional Magistrate was wrong for two reasons. First that the Bench Court under s. 349 cl. (1) (*a*) should have forwarded both the accused held guilty to the Sub-Divisional Magistrate and secondly that the Sub-Divisional Magistrate should have heard the case *de novo*.

It seems to us that the learned Additional Sessions Judge was right in thinking that the Bench Magistrate should have forwarded both the accused to the Sub-Divisional Magistrate. But we do not go to the length of saying that the Sub-Divisional Magistrate had no jurisdiction to try the accused who was actually sent up before him.

As regards the second ground we are distinctly of opinion that the learned Additional Sessions Judge has misread s. 350, cl. (2) as amended. Under s. 349, cl. (2) the Magistrate is not bound to hold a trial *de novo* and the recent amendment to s. 350, cl. (2) only makes the position clearer.

On these grounds of erroneous procedure the learned Additional Sessions Judge reversed the conviction and sentence passed against Bachayo and directed that the Sub-Divisional Magistrate should proceed with the case according to law in the light of his remarks. At the same time, being of opinion that Dodo should be tried in the same trial with Bachayo, he has released him on bail and has submitted his case to us.

We are of the opinion that in view of the order made by the learned Additional Sessions Judge directing re-trial of the accused Bachayo, it is desirable that Dodo also should be tried along with him.

The result is that we set aside the conviction recorded by the Bench Magistrates against Dodo and direct him to be tried along with Bachayo before the Sub-Divisional Magistrate.

Dodo may continue to remain on the same bail.

P. B. A. *Order accordingly.*

LAHORE HIGH COURT.

MISCELLANEOUS CRIMINAL APPEAL No. 160 OF 1924.

January 25, 1925.

Present:—Mr. Justice Harrison.

NARAIN DAS AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Magistrate protracting proceedings.

Where a Magistrate made an order during the trial of a case that he would examine only one witness a day and thus protracted the proceedings inordinately:

Held, that this was sufficient ground for directing that the case should be transferred from the Court of that Magistrate to the Court of some other competent Magistrate.

Application under s. 526, Cr. P. C., for transfer of the case from the Magistrate, First Class, Lahore, to some other competent Court.

Lala *Moti Sagar*, R. B., and Mehta *Amin Chand*, for the Petitioners.

ORDER.—This application for transfer discloses a peculiar and deplorable state of things. The case was *challaned* under the Excise Act and came up on the 1st of October 1924, when the only witness for the Crown was examined and the charge was framed. The accused were ordered to put in their list of defence witnesses on the following day, they having stated that they did not wish to re-call and further cross-examine the one witness, and the 15th of October was fixed for the examination of their witnesses. On that date a note was written by the Magistrate to the effect that it was stated that the Crown wished to withdraw the case, but it was not disclosed by whom the statement was made. He, therefore, adjourned the case to the 30th of October for that doubtful matter to be cleared up. On the 30th of October the Crown applied for adjournment as correspondence was in progress with the Revenue Authorities The case was adjourned to the 6th of November and again to the 21st of November, when the accused were ordered to put in a list of defence witnesses to be summoned for the 6th of December. The list was put in and on the 6th of December two witnesses were examined and a note was recorded by the Magistrate stating that two hours were devoted to this work and that re-examination was fixed for the working day, *i.e.*, the 8th and on the 8th after re-examining the one witness the Magistrate wrote an order saying: "I cannot devote any more time to this case to-day. I shall take it up from day to day. Defence want Mr. Brady to-morrow. Summon him for to-morrow."

Mr. Amin Chand, who appeared in the Trial Court, tells me that the Magistrate was asked by Counsel what was the exact meaning of the words "from day to day" and was told that one witness would be examined each day and not more, and this is borne out by the subsequent events. On the 9th one witness was examined, on the 11th one, on the 12th one, about an hour being spent on this work every day. On the 12th the accused put in an application through their Counsel pointing out that their time and money was being wasted by examination of one witness daily, and asking that one day should be fixed for recording the whole of the evidence. On this the Magistrate wrote an order regretting that it was impossible for him to do so. On this an application for transfer was presented.

I cannot imagine a more flagrant case of the direct disobedience of the clear orders of this Court as to disposal of work. I transfer the case to the Court of some other Magistrate to be named by the District Magistrate.

Mr. Moti Sagar had pointed out at the time of presenting this application that he did not wish the proceedings to start *de novo*. This he now wishes to qualify by saying that he will re-summon Mr. Brady only and any documentary evidence which may be allowed by the Trying Magistrate.

Z. K. *Case transferred.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 46 OF 1925.

June 1, 1925.

Present:—Mr. Simpson, A. J. C.

SITARAM—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 417, 439—Penal Code (Act XLV of 1860), ss. 302, 391, 395, 396—Dacoity—Shot fired to keep off rescue party—Dacoity with murder—Acquittal on charge of murder—Conviction on charge of dacoity—Appeal against acquittal, whether maintainable—Revision—Enhancement of sentence—High Court, interference by.

A dacoity begins as soon as there is an attempt to commit robbery and a shot fired thereafter in order to keep off a rescue party and to allow the theft to be committed is an act committed in committing the dacoity within the meaning of s. 396 of the Penal Code. [p. 454, col. 2.]

The High Court does not exercise its exceptional revisional powers in the direction of enhancing a sentence unless the sentence is manifestly inadequate. It is not enough that if a severer sentence had been imposed by the Court of Trial, the High Court sitting as a Court of Appeal might have been prepared to maintain the sentence. [p. 455, col. 1.]

Where an accused person is charged with offences under ss. 395 and 302 of the Penal Code and is acquitted of the latter charge and is convicted on the former charge, an appeal lies at the instance of the Local Government against the acquittal on the charge of murder in spite of the fact that the acquittal is only partial and the accused has been convicted of a lesser offence. In such a case the High Court will not by virtue of the provision contained in cl. (5) of s. 439 of the Cr. P. C. entertain an application by way of revision at the instance of the Local Government for enhancement of sentence under s. 395 or to set aside the conviction under that section and substitute one under s. 396 of the Code. [p. 455, cols. 1 & 2.]

Appeal against an order of the Additional Sessions Judge, Gonda, dated the 24th November 1924.

Mr. *G. H. Thomas*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Nageshwar Bari 40, Bhikhari Khatik 20, Raghubar Dayal Lonia 35, Sitaram Khatik 35, Elahi Qassab 45 and Shankar Khatik, 50, were tried at one trial along with sixteen other persons on a charge under s. 395 for dacoity. Nageshwar was sentenced to transportation for life, and the other five to ten years' rigorous imprisonment. The other sixteen were acquitted, but these six were convicted. Nageshwar Bari was further charged under ss. 396 and 302, Indian Penal Code, but he was acquitted on both these charges. There is also before us an application under s. 439 Cr. P. C., on behalf of the Local Government asking us to exercise our revisional powers in this way, to record a conviction under s. 396, Indian Penal Code, against all six appellants, and to sentence Nageshwar to death, and the other five to transportation for life.

The dacoity took place in the village Sekharpur, Police Station Balrampur, District Gonda, in the house of Harihar Prasad. Harihar Prasad is a Brahman fifteen or sixteen years old, but of weak intellect. The dacoits were said to have numbered fifty or more. They were armed with *lathis* and spears and there were two guns, one of which was captured from them. They began by beating five men who were sleeping at the door of the house. A sixth man Chhotan Lal, who was also sleeping there, managed to get out. He roused the village, and he set fire to a shed belonging to the house in order to give light. Among the people of the village who came to the rescue was Abdur Rahman, Kabaria, who headed the party. A shot was fired, and Abdur Rahman was killed. Another shot was fired and Ram Adhar Brahman was hit but not killed. A fight went on between the villagers and the dacoits, and the dacoits fled towards the north. Nageshwar Bari, appellant No. 1, and Bhikheri, appellant No. 2, were knocked down by *lathi* blows and were captured. Nageshwar Bari had a gun in his hand, which was captured with him. One iron box was broken open, but evidently the robbery was interrupted, and the dacoits were not able to ransack the house. We find no positive evidence of the value of the property stolen from the iron box, but the figure of Rs. 500 appears to have been mentioned in this connection.

It is not necessary to go more minutely into the facts of the case. It is not disputed that a dacoity took place, or that Abdur Rahman was killed by a gun-shot wound. Certain questions of law arise in the case of Nageshwar. It will be most convenient to consider these after disposing of the appeals of the other accused.

We take first the appeal of Bhikhari. Bhikhari was captured on the spot. He made a confession in which he described how Pershadi induced him to join in the dacoity. He gave a large number of names of persons who had taken part in the dacoity, and he gave a very brief account of what happened on the spot. He said that Nageshwar Bari had one gun, and Bodhi or Pershadi the other, and that both guns were fired. He produced no defence. He has nothing to say in his appeal except that he did not commit the dacoity. His appeal is dismissed.

Raghubir Dayal. He was identified in Court by five witnesses. The same five persons had identified him in Jail. His conviction must turn on the credibility of these witnesses. The Court of trial was in the best position to judge on this point. He had no defence. His appeal is dismissed.

Sita Ram. He has been identified in Court by six witnesses, three of whom, however, failed to identify him in the Jail. He was mentioned in the confessions of Nageshwar and Bhikhari. He had no defence. His appeal is dismissed.

Elahi. He was identified in Court by five witnesses four of whom had also identified him in the Jail. He had no defence. His appeal was presented separately by Counsel from Gonda, who urged very strongly that the mistake made by the witnesses, who identified Elahi, in the way of identifying wrong people in the Jail,

ought to prevent the Court from relying upon their evidence. As has been said before, the question is one of the credibility of the oral evidence, and the Court of Trial was in the best position to judge of this. Elahi's appeal is dismissed.

Shanker. He was identified in Court by four witnesses, three of whom identified him in Jail. His name appears in both the confessions of Nageshwar and Bhikhari. He had no defence. His appeal is dismissed.

We now take up the case of Nageshwar. As I have said, he was capturad on the spot with a gun in his hand. He made a confession which was duly recorded on the 6th June 1924. In this he mentioned a number of names of dacoits, and gave some account of the dacoity. He said that Matadin Khatik had one gun and Bhuda Khatik the other, both guns belonging to Bhuda Khatik. He said that it was Bhuda Khatik who fired the shot which killed one man, and that when Mata Din fired, several persons received shots. He said that the gun slipped from the hand of Mata Din at the time of his capture, but evidence is perfectly clear that the gun was in his hand when he was captured. There is evidence that it was this Nageshwar who fired the fatal shot. The witness Chhotan says he saw him do it. That is why the Magistrate framed a charge against Nageshwar under s. 396. The learned Sessions Judge rightly considering that s. 396 applies equally to every dacoit added charges against Nageshwar under s. 395 of dacoity, and under s. 302 of murder. We think that the learned Sessions Judge would have done well to frame charges under s 396 against all the dacoits. He acquitted Nageshwar under ss. 396 and 302. As regards s. 396 he held that "the murder was not committed either to get Abdur Rahman out of the way of the dacoits in carrying on the operation of the dacoity, or to obtain a clue of the place where the property might be found. The shot was fired to keep him away and the other villagers from reaching the place of occurrence." He, therefore, held that the murder was not committed in committing dacoity, and did not attract the provisions of s. 396. We do not agree with the learned Sessions Judge. Section 396 is as follows:—

"If any one of five or more persons who are conjointly committing dacoity commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

In construing the section it is necessary to go back to the definition of dacoity in s. 391:

"When five or more persons conjointly commit, or attempt to commit, a robbery, or where the whole number of persons conjointly committing or attempting to commit, a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting, or aiding, is said to commit "dacoity."

A dacoity then begins as soon as there is an attempt to commit robbery. A shot fired in order to keep of the rescue party, and allow the theft to be committed, is an act committed in committing dacoity. The acquittal of Nageshwar under s. 396 was wrong, and the opinion expressed that none of the accused persons is guility of the offence under s. 396 is also wrong. The learned Sessions Judge further acquitted Nageshwar under s. 302. This acquittal is based on the following reasoning.

"It is stated in both the confessions that the dacoits had not one gun but two. One of the guns was captured from Nageshwar Bari, and the nipple of a gun was found inside the house. It is also in evidence that only two shots were fired, and that one of these shots was fired by the accused Nageshwar Bari at the witness Ram Adhar."

He also concludes on the evidence of the Sub-Inspector who smelt the nipple of the other gun, that that gun also was fired and from this he concludes that Nageshwar could not have fired the shot which killed Abdur Rahman, and he discredits the evidence to that effect. We are not prepared to interfere with this finding, and we accept the conclusion that it was not Nageshwar Bari who fired the gun with which Abdur Rahman was shot dead. But we find that Nageshwar carried a gun and fired with it, and that he might rightly have been convicted under s. 396 instead of the murder of Abdur Rahman. Therefore, we see no reason to reduce the sentence of transportation for life, which has been given to him, and we dismiss Nageshwar Bari's appeal.

We pass now to the application in revision made by the Local Government. This falls into two heads, one relating to Nageshwar and the other to the other five appellants

As regards the other five appellants, there is no legal difficulty. They have been convicted under s. 395. We are asked to alter that finding to a conviction under s. 396 and to enhance the sentence from ten years' rigorous imprisonment, to transportation for life. There is no doubt that we have power to do so. But the Court will not ordinarily exercise its exceptional revisional power in the direction of enhancing sentences unless the sentences are manifestly inadequate. It is not enough that if sentences of transportation for life had been imposed by the Court of trial we might, sitting as a Court of Appeal, have been prepared to maintain the sentences. It was said in *Empress* v. *Chuni Lal* (1).

"The principles upon which this Court habitually acts as a Court of revision in relation to the enhancement of sentences are that it should not interfere if the sentences passed involve substantial punishment, and should interfere if the sentence is manifestly inadequate.....The Court frequently declines to interfere, in order to enhance a sentence, on the mere ground that it would itself have passed a heavier sentence, contending itself with pointing out that the sentence is so far light that a heavier sentence would have been maintained."

The practice of this Court has been the same as that of the Punjab Court. We consider the sentences passed substantial and adequate and, therefore, reject the application of the Local Government for the enhancement of the sentences of the other five appellants.

We pass now to the application in revision in so far as it relates to Nageshwar Bari. Now, here we are asked to convict Nageshwar under s. 396. Nageshwar was acquitted by the Trial Court under s. 396. We are of opinion that it was open to the Local Government to have filed an appeal against this acquittal. It was held in *Empress of India* v. *Judoonath Cangooly* (2) that where an accused person was charged with murder, and acquitted of murder but convicted of culpable homicide an appeal lay against the acquittal at the instance of the Local Government in spite of the fact that it was not a complete acquittal, the accused having been convicted of a lesser offence. We know of no authority to the contrary, and we are prepared to agree with this decision. The Legislature can hardly have intended to deprive the Local Government of its right to appeal in cases where an accused person has been acquitted of a very serious charge merely because at the same trial he was convicted of some other charge, possibly receiving a merely nominal sentence.

We hold, therefore, that we are precluded by the provisions of s. 439, cl. (5) from entertaining any proceedings by way of revision at the instance of the Local Government. We may add that if we had admitted this revision we should, for the same reason, as in the case of the other appellants, have declined to interfere with the sentence. In the result the application in revision is dismissed. The appeals having also been dismissed all the convictions and sentences stand good.

Z. K. *Appeals dismissed.*

(1) 7 P. R. 1889 Cr.
(2) 2 C. 273; 1 Ind. Jur. 629; 1 Ind. Dec. (N. S.) 466.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 2014 OF 1923.
April 7, 1924.

Present:—Mr. Justice Moti Sagar.

AJUDHIA PARSHAD—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 161—Illegal gratification—Intent.

Where there is nothing to show that the illegal gratification was received with one of the intents specified in s. 161, Penal Code, the conviction must be set aside. [p. 456, col. 2.]

Revision against an order of the Sessions Judge, Hissar, dated the 9th November 1924.

Mr. *Shamair Chand*, for the Appellant.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This is an application in revision against the conviction of the applicant under s. 161, Indian Penal Code. The petitioner was a pensions clerk in the Post Office at Gurgaon and was charged with having extorted a bribe of Rs. 2 from one *Musammat* Man Bhari who came to draw the arrears of her pension in that office on the 18th of July 1922. It is alleged that the petitioner demanded a bribe of Rs. 5 from the woman and told her that he would not pass the papers of

her pension unless she paid that money to him. The woman had no money in her possession and it is alleged that after some haggling it was agreed that the petitioner should pass the papers and that the woman would pay him a sum of Rs. 2 out of the money which she would receive on account of the arrears of her pension. The papers were accordingly passed and a sum of Rs. 105-9-0 was paid to the woman out of which the latter is alleged to have paid a sum of Rs. 2 to the applicant as originally agreed upon. One Abdul Qudus who was a clerk in the same office, saw the petitioner taking the money and putting it into his pocket and he reported the matter to the Post Master at once. The Post Master immediately started enquiries and examined the woman. She told him she had paid a sum of Rs. 2 to the clerk and it was discovered that the money in her possession was actually short by Rs. 2. The petitioner denied the receipt of any bribe and the sum of Rs. 2 was found lying on the window shelf near the place where the petitioner was sitting. The matter was reported to the higher authorities with the result that about ten months after the petitioner was *challaned* under s. 161, Indian Penal Code.

The petitioner pleaded not guilty and contended that the case had been concocted against him by Abdul Qudus with whom he was at enmity. The Trial Magistrate found the charges against the petitioner fully establishad and sentenced him to 18 months' rigorous imprisonment and a fine of Rs. 100.

On appeal to the learned Sessions Judge the conviction was upheld but the sentence was reduced from 18 months to six months' rigorous imprisonment only. The sentence as to fine was, however, allowed to stand.

In revision three contentions have been raised by Mr. Shamair Chand on behalf of the petitioner. First it is contended that there was very great delay in starting proceedings against the petitioner and that this fact makes the case extremely suspicious and throws a considerable doubt on the veracity of the prosecution witnesses. I am unable to agree with this contention. The matter, evidently had to be reported to the higher authorities and the preliminary enquiry was naturally bound to take some time. In the circumstances a delay of ten months is not very extraordinary and I overrule the contention. Next, it is argued that the evidence of Abdul Qudus should not be relied upon as the petitioner was at enmity with him and that the case was really the outcome of communal feelings between Hindus and Muhammadans in the office in which the petitioner was employed. This contention, in my opinion, is equally untenable. There is, no doubt, some evidence on the record from which it appears that the petitioner had made a report against Abdul Qudus, but this was more than two years before the present occurrence and I do not think that this circumstance alone would be sufficient to induce the witness to bring a false charge against the petitioner. As to the allegation that the case is the result of communal feelings between Hindu and Muhammadans there is no evidence on the record to support it and I do not think that when the Post Master himself, who was in charge of the office, was Hindu, the Muhammadan clerks, who were in minority, would have the courage to conduct a false case against the petitioner. In any case, there is no reason why *Musammat* Man Bhari and her two companions P. Ws. Nos. 3 and 4 who are admittedly Hindus, should combine with the Muhammadans to injure the petitioner who was an entire stranger to them. In my opinion, there is no force in this contention, and it must also be overruled.

Lastly it was contended that even if the story that the petitioner received a sum of Rs. 2 from *Musammat* Man Bhari was correct, there was nothing to show that the money was received with one of the intents specified in s. 161, Indian Penal Code, and that the case, therefore, did not fall within the purview of that section. This contention, in my opinion, is well founded and must prevail. In order to convict a person of an offence under s. 161, Indian Penal Code, it must be proved that he accepted the illegal gratification "as a motive or reward for doing or forbearing to do an official act or for showing or forbearing to show in the exercise of his official function favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person." Now the evidence produced in this case with regard to this point is of a most inconclusive character and cannot be relied upon. The first witness produced was B. Natgu Ram, Post Master, and he had obviously no personal knowledge as to

the circumstances under which the money is alleged to have been paid to the petitioner. He made certain enquiries immediately after the matter was reported to him and has only deposed to what was stated to him by *Musammat* Man Bhari and other witnesses when examined by him on the spot. He, however, admits that he did not see the petitioner taking the money and states further that he did not see the petitioner go out of the room during the whole of the time that the pension was being disbursed. Abdul Qudus, P. W. No. 5, and Abdul Karim P. W. No. 6 are also unable to say anything as to the conditions upon which the money was paid to the petitioner, and the only evidence upon this point from which an adverse inference could be drawn against the accused is that of *Musammat* Man Bhari P. W. No. 2, Narain Singh, P. W. No. 3 and Ghasita, P. W. No. 4. Now, these witnesses have made contradictory statements and their evidence is most unsatisfactory. In the preliminary enquiry made by the Revenue Officer under the orders of the District Magistrate these witnesses were examined and their evidence was not believed. The woman herself has stated that she paid the money for writing a petition. If this was so, it cannot be said that the money was received by the clerk in his official capacity for doing an official act for showing any favour in the exercise of his official function. The money was admittedly not recovered from the possession of the petitioner and was found lying on the window shelf near the place where he was sitting. I am not satisfied from the evidence how and under what circumstances the money was put there and I think that the petitioner is entitled to get the benefit of doubt.

I accept the revision and set aside the conviction and the sentence. The bail bond will be discharged.

S. D. *Petition accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1558 OF 1924.

January 16, 1925.

Present:—Mr. Justice LeRossignol

Musammat ALLAH WASAI AND ANOTHER —ACCUSED—PETITIONERS

versus

EMPEROR —RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 342, 526—Penal Code (Act XLV of 1860), s. 193—Transfer of case, application for, by accused—Affidavit, false statement in—Prosecution for perjury, whether permissible.

An application for transfer of a case made by an accused person is not a part of his defence and statements made by him in an affidavit in support of such an application do not enjoy the immunity conferred by s. 342 of the Cr. P. C., upon answers to questions put to the accused by the Court trying the case. Where, therefore, a false statement is made in such an affidavit, the accused person is liable to be prosecuted in respect of such statement for an offence under s. 193 of the Penal Code. [p. 458, col. 1.]

Case reported by the Sessions Judge, Multan, with his No. 18-G., dated the 6th-7th November 1924.

FACTS.—A complaint under s. 498, Indian Penal Code, was filed in the Court of Khan Bahadur Khan Rab Nawaz Khan, Honorary Magistrate, Multan, against Allah Ditta and two others, for enticing away *Musammat* Allah Wasai, the wife of the complainant. A warrant for the arrest of *Musammat* Alla Wasai as a witness in the case was issued by the Magistrate.

Allah Ditta and *Musammat* Allah Wasai jointly applied to the District Magistrate, Multan, for transfer of the case, alleging that the aunt of the complainant was the keep of the Magistrate. *Musammat* Allah Wasai, though not one of the accused stated in the application that she feared the Magistrate would order her to be forcibly made over to the complainant.

The application for transfer, which was accompanied by an affidavit thumb impressed by Allah Ditta alone was sent to the Magistrate concerned for report. He emphatically denied the allegation set forth therein.

Musammat Allah Wasai was sent for by the District Magistrate and examined (she stated she had filed a true application which was correct). At the same time she said she had never before seen complainant's aunt going to the Magistrate's house, but that people were saying she had been visiting there since her divorce.

The District Magistrate has ordered the prosecution of both Allah Ditta and *Musam-*

mat Allah Wasai under ss. 182 and 193, Indian Penal Code.

GROUNDS.—In *Emperor* v. *Bindeshri Singh* (1) it has been held that an accused person cannot be prosecuted under s. 193, Indian Penal Code, in respect of false statements contained in an affidavit accompanying an application for transfer.

In *Matan* v. *Emperor* (2) a similar decision has been given with respect to a prosecution under s. 182, Indian Penal Code.

The Public Prosecutor has not been able to refer me to any Punjab decision dealing with a case of this nature, and as the question of such prosecution is a matter of considerable importance to the Judiciary of the Province, I ventur to refer the case to the High Court for a ruling thereon. The case of *Musammat* Allah Wasai is somewhat different to that of Allah Ditta, inasmuch as she is not an accused in the case under s. 498, Indian Penal Code, but, it seems to me that if the proceedings against Allah Ditta are to be quashed, *Musammat* Allah Wasai ought not to be prosecuted alone, especially as she is not a signatory to the affidavit.

Mr. *Dhanpat Rai*, for the Petitioner.

Kanwar *Dalip Singh*, Government Advocate, for the Respondent.

ORDER.—During the hearing of a complaint under s. 498, Indian Penal Code, against Allah Ditta for enticing away *Musammat* Allah Wasai, the alleged wife of the complainant, Allah Ditta and *Musammat* Allah Wasai jointly applied to the District Magistrate for transfer of the case alleging that the aunt of the complainant was kept by the Magistrate. The allegation was emphatically denied by the Magistrate of the First Court and the District Magistrate has ordered the prosecution of both Allah Ditta and *Musammat* Allah Wasai under ss 182 and 193 of the Indian Penal Code.

The learned Sessions Judge has forwarded the proceedings for revision on the ground that in *Emperor* v. *Bindeshri Singh* (1) it was held that an accused person cannot be prosecuted under s. 193, Indian Penal Code, in respect of false statements contained in an affidavit accompanying an application for transfer, and a similar decision was arrived at in *Matan* v. *Emperor* (2). So far as *Musammat* Allah Wasai is concerned she was a mere tool in the hands of Allah Ditta and did not sign the application for transfer, although in a statement she did support it.

I set aside the order of the District Magistrate so far as she is concerned.

As regards Allah Ditta, I see no reason why the prosecution should not proceed. An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by s. 342 of the Cr. P. C. upon answers to questions put to the accused by the Court trying the case. This view was taken in *Ghulam Muhammad* v. *Emperor* (3) where the Allahabad view was considered and dissented from. I concur in the conclusions expressed in that decision of this Court and hold that the alleged false statement made by Allah Ditta was not part of his defence to the complaint which the Magistrate was trying, and that his trial, as directed by the District Magistrate, should proceed.

Z. K. *Order set aside.*

(1) 28 A. 331; A. W. N. (1906) 42; 3 A. L. J. 98; 3 Cr. L. J. 225.

(2) 7 Ind. Cas. 914; 33 A. 163; 11 Cr. L. J. 537; 7 A. L. J. 1143.

(3) 67 Ind. Cas. 351; 3 L. 46; 23 Cr. L. J. 399; (1922) A. I. R. (L.) 113; 4 U. P. L. R. (L.) 71.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 250 OF 1925.

April 30, 1925.

Present:—Mr. Justice Zafar Ali.

MUHAMMAD SADIQ AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, absence of, effect of—Illegality—Evidence—Report of medical witness, whether admissible.

During the trial of a warrant case the Magistrate examined the accused after taking some evidence and then framed a charge against them. He then recalled the witnesses that had already been examined to enable the accused to cross-examine them, and then examined two more prosecution witnesses. After taking the evidence of these two witnesses he did not question the accused as he was required to do by s. 342 of the Cr. P. C.:

Held, that the failure of the Magistrate to comply with the provisions of s. 342 of the Code amounted to an illegality which vitiated the trial.

A medical witness can use the entries made by him in his register for the purpose of refreshing his memory but a copy of those entries cannot be treated as substantive evidence in the case.

Roghuni Singh v. *Empress*, 9 C. 455; 11 C. L. R. 569; 5 Shome L. R. 47; 4 Ind. Dec. (N. S.) 952, followed.

Criminal appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30 of the Cr. P. C., Kasur, District Lahore, dated the 19th February 1925.

Mr. *Brij Lal*, for the Appellants.

ORDER.—The learned Counsel for the appellants who have been convicted by a s. 30, Magistrate of an attempt to commit murder, contends that the trial was vitiated by the Magistrate's omission to examine the accused at the close of the prosecution evidence and before calling on them for their defence. The Magistrate examined the accused after taking some evidence and then framed a charge against them. After doing so he re-called the witnesses that had already been examined to enable the accused to cross-examine them and then examined the remaining two prosecution witnesses. After taking the evidence of these two witnesses he did not question the accused as he was required to do by s. 342 of the Cr. P. C. to give them an opportunity of explaining the evidence against them given by these two witnesses. Thus the Magistrate failed to do what he was bound to do under s. 342 of the Cr. P. C. and the learned Counsel for the appellants contends that the accused were seriously prejudiced by this omission. The rulings of almost all the High Courts are that failure to so examine an accused is not mere irregularity but an illegality which vitiates the trial. The learned Counsel further points out that the Magistrate did not examine the medical witness properly inasmuch as he allowed him to put in a copy of the statement of injuries recorded in his register of medico-legal cases and accepted it as evidence instead of examining him in respect of those injuries. The medical witness could use the entries made by him in the register for the purpose of refreshing his memory but a copy of those entries could not be treated as evidence. In *Roghuni Singh* v. *Empress* (1), it was held that a *post mortem* report was not evidence and that a medical man in giving evidence may refresh his memory by referring to that report but that the report itself cannot be treated as evidence and that no facts could be taken therefrom. In the present case also the Magistrate ought to have examined the witness instead of admitting his record of the description of the injuries as evidence.

I, therefore, set aside the convictions and sentences and order re-trial.

One of the accused Ahmad Din is only 15 years of age and another Wazir is aged twenty only. Both these need not be detained in custody and may be released on furnishing bail in the amount of Rs. 1,000 each with one surety. The rest of the appellants will be transferred to the judicial lock-up.

The case should now go to some other s. 30 Magistrate for trial.

Z. K. *Conviction set aside.*

(1) 9 C. 455; 11 C. L. R. 569; 5 Shome L. R. 47; 4 Ind. Dec. (N. S.) 952.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 100 OF 1925.

February 16, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Gyi.

U ZAGRIYA AND OTHERS—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 418, 443, 447, 449, 534—Trial by Jury—Omission of Magistrate to inform accused of his rights under Ch. XXXIII, effect of—Irregularity—Trial under Ch. XXIII—Appeal, whether lies—Sentence, whether question of law.

An omission by a Magistrate to inform an accused person of his rights under Ch. XXXIII of the Cr. P. C. as required by s. 447 of the Code is absolutely cured by the provisions of s. 534 of the Code. [p. 460, col. 2.]

A person who has not been tried under the provisions of Ch. XXXIII of the Cr. P. C., has no right of appeal under s. 449 of the Code. [*ibid.*]

In the case of a trial by Jury under the provisions of Ch. XXIII of the Cr. P. C. an appeal lies only on a matter of law under s. 418 of the Code. For the purposes of such an appeal a question of sentence is deemed to be a matter of law. [*ibid.*]

Mr. *Mya U*, for the Appellants.

JUDGMENT.—This is an appeal purporting to be laid under s. 449 of the Cr. P. C. It has been put down for admission on the question as to whether any appeal lies. The case was tried by a Jury at the Sessions Court and it is admitted that *prima facie* no appeal lies under s. 418 or under the Letters Patent except on the question of sentence. Section 449 (1)(*a*) gives an appeal in a case tried by Jury in a High Court under the provisions of Ch. XXXIII. This case was not, however, tried under the

provisions of Ch. XXXIII, but under the provisions of Ch. XXIII. It is clear that the case is one which might have been tried under the provisions of Chap. XXXIII and the Magistrate, who committed the case to Sessions, did not inform the accused of their rights under Ch. XXXIII. His omission to do so is the principal ground put forward before us. The accused were defended by two Counsel before the Magistrate but no claim to be tried under the provisions of Ch. XXXIII was made at any one of the stages specified in s. 443. The accused were then committed to Sessions and after charges had been read and explained to the accused and each accused had pleaded not guilty, the Court proceeded to empanel the Jury. Mr. Mya U informed us that he took an objection that under the provisions of s. 275 of the Code the majority of the Jury should consist of Indians. The record did not bear him out and on being pressed, he said that he did not remember, that he was ill at the time, that he subsequently had to go to hospital and that he was under the impression that, when the objection was made, no Juryman had been empanelled. The objection was taken in the following way:—Mr. Mya U had challenged eight Jurymen, and when the 9th one, Mr. Morten, was called, he also challenged him. The learned Judge pointed out that eight objections without grounds had already been allowed, and called upon Mr. Mya U to state the grounds of objection to Mr. Morten. Mr. Mya U then said that his only ground was that the accused wished to be tried by a majority of their own countrymen. It was in this fashion that the objection is said to have been taken. The diary proceeded to record that Mr. Mya U admitted that the accused had made no application to be tried under the provisions of the Ch. XXXIII, and that he also admitted that they were not entitled to claim a majority of Jury under s. 275 of the Code. His objection to Mr. Morten was, therefore, not allowed, and Mr. Morten took his seat in the Jury box. A list of the Jury on page 18 of the record shows that Mr. Morten was the last Juryman to be empanelled, and that there were, therefore, eight juryman who had been called and empanelled without objection on either side before Mr. Morten was empanelled. We have also received a note from the learned Judge who presided at Sessions. He states quite definitely that there is no doubt whatever that 8 Jurors had already been chosen unchallenged by either side who had already taken their seats in the box before Mr. Mya U made any claim or gave any indication that he intended to make it. On these facts it remains to see whether any appeal lies under s. 449. Section 443 lays down that the accused may, at any time before he is committed for trial under s. 213, or is asked to show cause under s. 242, or enters on his defence under s. 256, as the case may be, claim that the accused ought to be tried under the provisions of Ch. XXXIII. No such claim was made at any of these stages or at all before the Magistrate. As regards the omission of the Magistrate to inform the accused of their rights under Ch. XXXIII, as required by s. 447, that omission is absolutely cured by the provisions of s 534, which lays down that an omission to inform under s. 447 any person of his rights under Ch. XXXIII shall not affect the validity of any proceeding. When the accused came before the Sessions, the claim might have been made under s. 275 of the Code, but that section says that the claim must be made before the first Juror is called and accepted. It is perfectly clear that no such claim was made before the first Juror was called and accepted. Above all this, there is the statement in the diary that it was admitted that the right to be tried under the provisions of Ch. XXXIII did not exist at the time Mr. Mya U gave his reasons for objecting to Mr. Morten. The accused have not been tried under the provisions of Ch XXXIII s. 449 of the Code does not apply, and an appeal would only lie under the provisions of s. 418. That section debars any appeal on a matter of fact where the trial was to be by Jury, in such case the appeal lies only on a matter of law. So far as the objection to the Magistrate's action and to the trial, both points are a matter of law, and we are clearly of opinion that there is no substance in either of them for the reasons we have set out above. The question of sentence is, for the purposes of an appeal, deemed to be a matter of law. We were not addressed on the question of sentence, although there is a ground of appeal. We have considered the sentences and we are of opinion that there is no sufficient reason to interfere with them. We also note that this appeal is barred by time. It is contended that the time spent in obtaining copy of the diary orders in the case, which were filed with the appeal should be deducted; but there is no rule of this Court

nor in the Code, requiring to deduct this period. The appeal is, therefore, barred by time. We pointed out to Mr. Mya U that the proper course was to move the Government Advocate for a certificate, but he has stated that he has done so, and that the Government Advocate has refused to grant the certificate. The appeal is, therefore, summarily dismissed.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 88 OF 1925.

April 6, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Fforde.

Musammat DAULAN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Criminal Procedure Code (Act V of 1898), s. 401—Murder—Death of infant caused by blow from heavy weapon—Accused suffering from ill-treatment of husband—Youth of accused—Sentence—Recommendation to mercy.

Accused, who was a young woman of fifteen years of age, being roused to frenzy by the ill-treatment of her husband seized the first weapon that came to her hand and made a murderous attack on her step-son in order to avenge herself against her husband and caused the death of the infant. The weapon used by her was a very heavy one :

Held, (1) that the intention of the accused was to cause death and that she was, therefore, guilty of the offence of murder ;

(2) that considering the age of the accused and the other circumstances of the case the capital sentence was uncalled for and that a lesser sentence even than one of transportation for life would meet the ends of justice and that the record of the case should be forwarded to the Local Government in order that it may take action, if it deemed it suitable to do so, under s. 401 of the Cr. P. C.

Appeal from an order of the Sessions Judge, Lyallpur, dated the 20th December 1924.

Lala *Nanwan Mal*, for the Appellant.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This is an appeal by *Masammat* Daulan, who has been convicted by the Sessions Judge of Layallpur for the murder of her step-son, Malla, by striking a blow on his head with a *kahi*. She has been sentenced to death and the case is also before us under s. 371 for confirmation of the sentence.

It is proved in the clearest possible manner by the evidence of *Musammat* Sattan (P. W. No. 2), an eye-witness, and by that of Umar Din (P. W. No. 3) and Nizam Din (P. W. No. 4), who came up immediately afterwards and seized the appellant, that she did give her step son a blow on the head with a *kahi*, and would probably have given further blows had she not been seized. The First Information Report was made promptly by Baja, a cousin of Sajawal, *Musammat* Daulan's husband. The evidence shows that Sajawal, who is 40 years of age, married the appellant who is not, more than 15 years of age, about a month after the death of his first wife. The couple did not get on well together because the girl did not like to live with her husband and used to run away to her parents' house. On the day before the murder she had run away to the house of one Ismail and on the morning of the 1st August was brought back home and beaten, and when Sajawal went out to work in his fields he chained her feet together to prevent her running away again. Shortly after this he was informed that his infant son had been killed by the appellant and returned home.

It seems obvious that *Musammat* Daulan being roused to frenzy by the way in which she was treated, seized the first weapon that came to her hand and made a murderous attack on her step-son in order to avenge herself against her husband. There is no reason for rejecting the prosecution evidence, and having regard to the fact that the appellant used such a heavy weapon and struck a blow on the head there can be no doubt that her intention was to cause death. We think, therefore, that she has been rightly convicted of murder.

Considering her age, which she gives as 13 and which the Court puts at 15, and the other circumstances of the case the capital sentence was quite uncalled for. In fact we think that a lesser sentence than one of transportation for life, which we are obliged to impose, would meet the ends of justice.

We, therefore, accept the appeal and reduce the sentence to one of transportation for life and direct the record to be forwarded to the Local Government in order that it may take action if it deems it suitable to do so under s. 401 of the Cr. P. C.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 41 OF 1925.

April 7, 1925.

Present:—Mr. Dalal, J. C.

KHUMAN SINGH AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 439—Examination of accused—Omission to examine accused after charge—Revision—Interference by High Court.

In a warrant case the accused were not further examined after the charge and after the prosecution witnesses had been re-called for cross-examination. In revision :

Held, that substantial justice having been done the Court will not interfere in the case, irrespective of the question of law whether the omission to examine the accused was an illegality or merely an irregularity.

Application for revision from an order of the Second Additional Sessions Judge, Lucknow at Unao, upholding that of the Magistrate, First Class, Unao.

Mr. *M. A. Khan*, for the Applicants.

JUDGMENT.—The applicants were convicted of an offence under s. 147 of the Indian Penal Code and sentenced to a fine. There was also a cross-case brought by them against their antagonists. The objections taken in revision are (1) that there was a joint trial of the two cross-cases and (2) that the applicants were not examined after the prosecution witnesses were cross-examined on their behalf after the charge was framed.

The trial of the two cross-cases was separate. The Magistrate wrote one judgment which was not an illegality. Separate orders in each case were passed.

Substantial justice has been done so I have no desire to discuss the law under s. 342 (1) of the Cr. P. C. as to whether the applicants ought or ought not to have been examined after the prosecution witnesses were cross-examined after the framing of the charge. Only as late as the 17th of March my learned predecessor decided *Emperor* v. *Brij Behari* (1) that omission to make further examination of the accused after the charge and after prosecution witnesses have been re-called for cross-examination is not an illegality which vitiates the trial without regard to whether the accused has been prejudiced or not. In the notes and comments of the Oudh Weekly Notes of 1st April certain rulings to the contrary are noted. This matter arising in this application however is not of such importance as to require decision here by a Bench of two Judges. The applicants have only been fined and, as observed by the learned Sessions Judge, substantial justice has been done. I pronounce no opinion on the question of law and content myself by saying that I refuse to interfere.

This application is dismissed.

Z. K. *Application dismissed.*

(1) 89 Ind. Cas. 245; 2 O. W. N. 327; 12 O. L. J. 182; 28 O. C. 130; (1925) A. I. R. (O.) 422; 26 Cr. L. J. 1301.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1736 OF 1924.

February 25, 1925.

Present:—Justice Sir Henry Scott-Smith, KT.

KIRPAL SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Law Amendment Act (XIV of 1908), ss. 16, 17 (1), (2)—Penal Code (Act XLV of 1860), s. 117—Exhorting people to form themselves into unlawful association—Appeal for contribution towards funds of association—Offence.

A certain association and all *jathas* organized by or affiliated to it had been declared to be unlawful associations within the meaning of s. 16 of the Criminal Law Amendment Act. Accused acting under the orders of the unlawful association addressed a meeting calling upon those present to organize *jathas* to act under the orders of the unlawful association and at a subsequent meeting he read a communique from the unlawful association to the effect that the persons present should contribute a certain amount towards the funds of the association and proceeded actually to collect money for that fund :

Held, (1) that as there was no existing *jatha* which the accused incited, persons to join and as he did not himself contribute to the funds of the unlawful association or assist in the management of the association the accused was not guilty of an offence either under sub-s. (1) or under sub-s. (2) of s. 17 of the Criminal Law Amendment Act ;

(2) that having, however, instigated people to form themselves into an unlawful association, the accused was guilty of an offence under s. 117 of the Penal Code.

Petition for revision of an order of the Sessions Judge, Rawalpindi, dated the 11th November 1924, affirming that of the Magistrate, First Class, Rawalpindi, dated the 13th August 1924.

Mr. *C. H. Oertal*, for the Petitioner.

Kunwar *Dalip Singh*, Government Advocate, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the Sessions Judge of Rawalpindi dismissing an appeal from the petitioner's conviction for an

offence under s. 17, sub-s.(2), Criminal Law Amendment Act, XIV 1908.

The facts found against the petitioner are that (1) at a meeting of the Singh Sabha in Rawalpindi on the 6th of July 1924 he delivered a speech calling upon the Sikhs assembled to organize *jathas* of either 500 or 250 each for the purpose of going to Amritsar and proceeding to Jaito under the orders of the Shromani Gurdwara Parbandhak Committee, and (2) that at a subsequent meeting of the same Singh Sabha on the 9th of July he exhorted the Sikhs to enlist themselves for *shahidi jathas* for the purpose of going to Jaito. It is also found that in the Diwan held on the 5th of March he read a communique from the Shromani Gurdwara Parbandhak Committee to the effect that every Sikh should contribute his share of five pice Panj Paisa Fund and that he actually collected money for that fund.

The Magistrate found that he had committed offences both under s. 17 (1) and s. 17 (2) of the Criminal Law Amendment Act, but sentenced him for the latter offence only to two years' rigorous imprisonment.

The learned Sessions Judge dismissed the appeal. In the course of his judgment he stated that there was no evidence to show that any meeting or unlawful association was held in consequence of petitioner's speech but he was of opinion that he had promoted such a meeting or association because he instigated persons to join such an association within the meaning of the sub-s. (2). In this connection he referred to *Jaswant Rai* v. *Emperor* (1). Counsel for the petitioner relies upon *Emperor* v. *Mihan Singh* (2), in which it was held that the accused's act in that case did not come within the purview of either of cl. (1) or (2) of s. 17 of the Criminal Law Amendment Act, as he did not contribute to the fund or assist in the management of an existing association. On the strength of this ruling it is contended that as there was no existing *jatha* which the petitioner incited persons to join, he did not commit any offence under s. 17 (2). The learned Government Advocate concedes this point, but contends that the petitioner urged the people to form themselves into *jathas* under the orders of the Shromani Gurdwara Parbandhak Committee, *i. e*, to form themselves into an unlawful association, and, therefore, committed an offence under s. 117, Indian Penal Code, and he suggests that the conviction be altered into one under that section. The Punjab Government Notification No. 23772 of the 12th October 1923 is as follows :—

"Whereas the Governor of the Punjab in Council is of opinion that the association known as the "Shromani Gurdwara Parbandhak Committee and all *jathas* organized by or affiliated to this body interfere with the maintenance of law and order, and that they jointly and severally constitute a danger to the public peace ;

"Now, therefore, the Governor of the Punjab in Council, by virtue of the powers conferred upon him by s. 16 of the Criminal Law Amendment Act, 1908, as amended by the Devolution Act, 1920, is pleased hereby to declare the said Shromani Gurdwara Parbandhak Committee and the said *jathas* to be unlawful associations." This Notification shows that not only the Shromani Gurdwara Parbhandak Committee was declared to be an unlawful association under s. 16 of the Criminal Law Amendment Act but also all *jathas* organized by or affiliated to that body were so declared.

It is, therefore, urged by the learned Government Advocate that the petitioner instigated people to become members of a *jatha* under the orders of the said Committee which *jatha* would be unlawful association within the meaning of s. 16. In my opinion there is force in this contention and I do not see that the petitioner will be in any wise prejudiced by the alteration of his conviction even though he was not charged with an offence under s. 117, Indian Penal Code. In the case reported as *Crown* v. *Mihan Singh* (2) the accused was convicted of an offence under that section, though he was not charged thereunder. In that case the accused though a gentleman of influence was punished only with a fine and I, therefore, do not think that the petitioner in this case deserves so severe a sentence as one of two years' rigorous imprisonment. He has already been more than six months in Jail and that is, in my opinion, a sufficient sentence.

I, therefore, allow the revision so far as to alter the conviction to one under s. 117, Indian Penal Code, and reduce the sentence to the term of imprisonment already undergone.

Z. K. *Appeal accepted.*

(1) 10 P. R. 1907 Cr.; 14 P. W. R. 1907 Cr.; 5 Cr. L. J. 439; 2 M. L. T. 472.

(2) 89 Ind. Cas. 392; 5 L. 1; (1924) A. I. R. (L.) 440; 26 Cr. L. J. 1352.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 25 OF 1925.

July 8, 1925.

Present:—Mr. Simpson, A. J. C.

EMPEROR—PROSECUTOR

versus

PHIKKU—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), s. 498—Evidence Act (I of 1872), ss. 50, 58—Enticing away married woman—Marriage, proof of—Admission of accused, effect of.

In order to prove a marriage for the purposes of a prosecution under s. 498 of the Penal Code it is not enough that the prosecutor says that the woman is his wife and the woman says that she is married to the prosecutor. The marriage must be proved like any other essential fact in the case by direct evidence of witnesses speaking to the facts said to constitute a marriage, so that the Court may determine whether what the witnesses state to have taken place did take place in fact and if so whether it constitutes a marriage in point of law.

The admission of the accused that the woman is the wife of the prosecutor does not absolve the prosecution from proving the marriage.

Case reported by the Sessions Judge, Sitapur, dated the 16th May 1925.

Mr. *S. M. Ahmad*, for the Applicant.

ORDER.—This is reference by the Sessions Judge of Sitapur. The case was one under s. 498, Indian Penal Code. There were originally three accused, but one of the three was acquitted by the Court of Trial and another by the Appellate Court. So, I am only concerned with the third accused, whose appeal was dismissed. He is under sentence of three months' rigorous imprisonment. The learned Sessions Judge has referred the case on the ground that there is not sufficient proof of the marriage. The learned District Magistrate noted that there was no evidence of the marriage. He stated:

"It is not enough to take this for granted. It is a matter which requires formal proof. I have taken additional evidence on this point, the statement of the woman. Ordinarily, this would not be enough, but as the principal accused also states that the woman is the lawful wife of the complainant, and as he is in the best position to know this, being her sister's husband and a next-door neighbour, I take it as proved."

In the case of *Empress* v. *Pitambur Singh* (1) which was a decision of a Full Bench it was unanimously held by five Judges that the evidence of the prosecutor "she is my wife by marriage" and the statement of the woman "I am married to the prosecutor", was not sufficient to support a convicion for adultery under s. 497. It was held that the marriage ought to be proved like any other essential fact in the case by direct evidence of witnesses speaking to the facts said to constitute a marriage, so that the Court may determine whether, what they state to have taken place, did take place in fact, and if so, whether it constitutes a marriage in point of law. The Court adverted to the terms of s. 50 of the Indian Evidence Act which runs as follows:—

"When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevent fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under ss. 491, 495, 497 or 498 of the Indian Penal Code."

This decision has never been dissented from, and there are similar decisions of other High Courts.

There is also a decision of this Court, *Queen-Empress* v. *Pirthi* (2). As regard the admission of the prisoner, it is true, that under s. 58 of the Indian Evidence Act, no fact need be proved which the parties agree to admit, but there is a proviso to this section, that the Court may in its discretion require the facts admitted to be proved, and it is the undoubted practice of the Courts to require strict proof of all the facts essential to a conviction. It was said in *Empress of India* v. *Kallu*, (3) that "the admission of the appellant in no way strengthens the position." This being the state of the law the conviction cannot stand. I accept the reference, and set aside the conviction of Phikku and acquit him. He need not surrender to his bail.

Reference accepted.

Z. K.

(1) 5 C. 566; 5 C. L. R. 597; 3 Shome. L. R. Cr. R. 13; 2 Ind. Dec. (N. S.) 968.

(2) 3 O. C. 342.

(3) 5 A. 233; A. W.N. (1883) 1; 3 Ind. Dec. (N. S.) 205.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 23 OF 1924.

April 6, 1925.

Present:—Mr Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

ALGOO PATHAK—PLAINTIFF—APPELLANT

versus

SHAMI NARAIN PATHAK AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 48, 108 (10) (b)—Occupancy holding—Death of tenant—Suit by one heir to recover his charge—Jurisdiction of Civil and Revenue Courts—Claim with regard to groves, whether can be entertained by Civil Courts.

A suit to recover the plaintiff's share in an occupancy holding under s. 48 of the Oudh Rent Act to which the parties are alleged to be jointly entitled as the heirs of the deceased tenant, is not cognizable by a Civil Court by virtue of the provision contained in cl. (10) (*b*) of s. 108 of the Act. Where the holding consists of culturable land and of groves, the entire suit is excluded from the cognizance of the Civil Court and no distinction can be made with regard to the area covered by the groves. [p. 466, cols. 1 & 2.]

Appeal against an order of the District Judge, Fyzabad, dated the 19th January 1925, reversing that of the Additional Sub-Judge, Sultanpur, dated the 20th October 1924.

Mr. *Ali Zaheer* for Mr. *Radha Krishan*, for the Appellant.

Mr. *R. D. Sinha*, for the Respondent.

JUDGMENT.

Dalal, J. C.—(*March 9, 1925*).—This is a question of considerable recurrence and I consider it of sufficient importance to be decided by a Bench of two Judges of this Court.

The following pedigree will indicate the relationship between the parties:—

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Kalidin = *Musammat* Ramdei, widow died 1919.	Nakched = *Musammat* Jagdei, died September 1917.	Benimadho.

Algu, plaintiff.	Sukhram, died 5th December 1918

Sheo Narain, defendant No. 1.	Parmeshardin, defendant No. 2.	Bhagwatidin, defendant No. 3.

Algu plaintiff sued the defendants his nephews for possession of occupancy land. His case was that his uncle Kali Din's widow Ram Dei died in 1919 when he was the next reversioner to the tenancy land. Under s. 48 of the Oudh Rent Act when a statutory tenant dies his heirs shall be entitled to retain occupation of the holding at the rent payable by the deceased for a period of five years from the date of the tenant's death. Algu has made no allegation in the plaint that he shared in the cultivation of the holding at the date of the death of the deceased *Musammat* Ram Dei, but this is not the question which arises at present. What the lower Appellate Court held was that Algu was not entitled to bring the suit in the Civil Court because such a suit lay only in the Revenue Court under s. 108 (10) (*b*) of the Oudh Rent Act. That Court relied upon a Bench decision of this Court reported as *Bikarmajit Singh* v. *Bansraji* (1). The Judges, however, do not appear to have been in agreement on this particular question and one of the Judges pointed out that a consideration of the provisions of s. 108 (10-*b*) did not arise.

In *Ashiq Ali* v. *Ghulam Sarwar* (2) I gave reasons for a contrary opinion. Prior to the amendment of the Oudh Rent Act a learned Judicial Commissioner of this Court now Mr. Justice Kanhaiya Lal had held in *Lachhman* v. *Ram Singh* (3) that as between persons claiming to be co-tenants under title derived from a common ancestor the question is really one of inheritance and the Civil Court is not debarred from entering into it. I do not think that the amendment of the Oudh Rent Act has made any difference. In my opinion the cognizance of the Civil Court is debarred only where the suit is specifically brought against the proprietor. What is asserted by the plaintiff here is that the defendant committed trespass as against him. Where a new tenancy is created in favour of the defendants by the *zemindar*, virtually amounting to the ejectment of Algu, the case would be different. The Trial Court however has specifically held that there was no evidence to prove that the land in suit was let by the *zemindar* to the defendants after the death of *Musammat* Ram Dei.

The question is whether a suit between

(1) 80 Ind. Cas. 271; 11 O. L. J. 717; 10 O. & A. L. L. R. 764; L. R. 5 A. (O.) 173; (1925) A. I. R. (O.) 274.

(2) 74 Ind. Cas. 553; 11 O. L. J. 18; 9 O. & A. L. R. 521; (1924) A. I. R. (O.) 175; L. R. 5 A. (O.) 7.

(3) 61 Ind. Cas. 290; 24 O. C. 15.

rival tenants as to right of inheritance to an occupancy holding under s. 48 of the Oudh Rent Act lies in a Civil Court or whether the jurisdiction of that Court is barred by the provisions of s. 108 (10) (*b*).

If the Civil Court has jurisdiction the appeal will have to be remitted to the lower Appellate Court for decision on the merits.

JUDGMENT.—This is the plaintiff's appeal from an order dated the 19th January 1925 of the District Judge of Fyzabad, setting aside the decree, dated the 20th October 1924, of the Subordinate Judge of Sultanpur and returning the plaint to the plaintiff-appellant for presentation to the proper Court. The appeal is under O. XLIII, r. 1, cl. (*a*) of the C. P. C. The learned Judge of the Court below is of opinion that the jurisdiction of the Civil Court to entertain the suit, out of which this appeal arises, is barred by cl. 10 (*b*) of s. 108 of the Oudh Rent Act.

The plaintiff's case as stated in the plaint is that the property in suit was held by *Musammat* Ram Dei in the character of a Hindu widow; that *Musammat* Ram Dei died on the 10th November 1919 and that the plaintiff and the defendants were the only reversionary heirs of her husband at the time of her death but that the defendants took forcible possession of the entire property to the exclusion of the plaintiff. The relief prayed for was a decree for possession.

The property in suit consists of certain plots of culturable land and certain other plots bearing the character of groves. The landlord of the entire property in suit is the Raja of Amethi. On the averments of the plaint and the pleadings in the case it is clear that the title on which the plaintiff's claim rests relates to a tenancy holding under s. 48 of the Oudh Rent Act. This being so, the present case is clearly governed by the principle of the decision of a Bench of this Court in the case of *Thakur Bikarmajit Singh* v. *Bansraji* (1). According to the view adopted in that case the cognizance of the present suit by the Civil Court is barred by cl. 10 (*b*) of s. 108 of the Oudh Rent Act. We are not prepared to disagree with the decision in that case.

It was argued by the learned Counsel for the appellant that the suit in so far as it related to the possession of the groves was cognizable by the Civil Court and that consequently on the principle of the decision in the cases of *Abdul Aziz* v. *Nawab Malika Mukhadra Uzma Badshah Mahal Sahiba* (4) and *Umrao Bahadur* v. *Secretary of State for India* (5) the whole suit was cognizable by that Court.

We are, however, of opinion that those decisions are inapplicable to the present case. The groves as much as the agricultural area are held under the same tenancy and in the plaint no distinction is made between the two in respect of the plaintiff's title. The title is the same and that is the title under s. 48 of the Oudh Rent Act.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(4) 1 O. C. Sup. 1.
(5) 24 Ind. Cas. 788; 1 O. L. J. 124.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 194 OF 1924.

May 20, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

KOMIL PRASAD—DEFENDANT—APPELLANT

versus

Babu BHARAT INDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—House situated in village occupied by person claiming to be owner—Sale of house—Possession of vendee, nature of—Ejectment suit—Limitation.

A house situated in a village which was occupied by a person who was not a tenant or *raiyat* of the *zemindar*, was sold by the person in occupation to a *raiyat* in the village and the sale-deed contained a recital that the vendor was the absolute owner of the house and the site and that he was transferring his proprietary interest therein. The transferee obtained possession of the house and continued in possession of it for more than twelve years. The *zemindar*, who had never been in actual possession of the house, sued to eject the transferee from the house:

Held, that the defendant's possession was adverse to the *zemindar* and that consequently the suit must fail. [p. 468, col. 1.]

First appeal from an order of the Subordinate Judge, Farrukhabad, dated the 25th November 1924.

Dr. *M. Wali Ullah*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for ejectment brought by the plaintiffs who have purchased the village. The house in question is situated in Kamalganj in the District of Farrukhabad and has the following history. This house was purchased at auction from some one else by Babu Lachmandas. It is not clear what the true character of the possession of the judgment-debtor had been but we know that Babu Lachmandas had been a *zemindar* in the village and was a *bairagi*. He was certainly not a tenant or an ordinary occupier like a *raiyat*. On the 15th of October 1881 he sold this house along with its site to the predecessor of the defendant and there was a clear recital in the sale-deed that he was the full owner of the house and the site and was transferring his proprietary interest. This sale-deed was actually attested by Shib Dayal, one of the *zemindars* in the village and the predecessor in title of the present plaintiffs. Subsequently the house was sold again and then ultimately acquired by the present defendant. On the other hand the plaintiffs have acquired an interest in the village from the *zemindar*.

The defence mainly was that the defendant and his predecessor had been in adverse possession of the site all along and are its full proprietors and that the plaintiffs never had any possession over or title in the property. The learned Munsif came to the conclusion that the defendant had fully established his adverse possession and that the plaintiffs had failed to prove that they ever had any possession within twelve years of the suit or that their title had even been acknowledged. He accordingly dismissed the suit. On appeal the lower Appellate Court has set aside that decree and remanded the case.

Ordinarily a finding on the question of adverse possession would be a finding of fact and binding in further appeal but in this case the learned Subordinate Judge of the lower Appellate Court has made several errors of law. In the first place he has distinguished the Full Bench case of *Incha Ram* v. *Bande Ali Khan* (1) on the supposition that the site of the shop in dispute in that case was situated in a market (*ganj*) and not within the ordinary ambit of the *zemindari*. That this is incorrect will appear from page 880* of the report where Richards, C. J. remarked that it had been found that the site in question was not situated in the *ganj* established by Mr. Redcock. Then again the learned Subordinate Judge thought that inasmuch as the present occupier of this house, namely, respondent No. 2 was a tenant of the village, therefore, the presumption that the house belonged to the *zemindar* at once arose. He forgot to notice that although the present respondent happens to be a tenant he has established the way in which the house has devolved on him and has shown that at any rate in 1881 the occupier of the house was not a tenant but was a *zemindar* about whom there can be no presumption of law that he was a mere tenant or *raiyat* of the other *zemindars*. We think that the rule of law laid down in the Full Bench case of *Incha Ram* v. *Bande Ali Khan* (1) applies clearly to this case. As a matter of fact that case arose out of a dispute with regard to a house situate in this very village. Richards, C. J., remarked that it was quite clear that Kamalganj was not an ordinary agricultural village in which the ordinary strong presumption of the ownership of the *zemindar* arose. In the circumstances he did not think that it was necessary that the defendants should prove that they expressly set up adverse possession more than twelves years before the suit. Banerji, J., distinctly held :—

"It not being proved that the occupation of the site in question was with the leave and license of the landlord, but it being proved that the occupier belonged to a class of persons...who ordinarily found no place in an agricultural village that he never acknowledged the landlord's title and never paid rent or any other dues to him for the occupation of the site, the ordinary rule that every plaintiff against whom limitation is pleaded must prove subsisting title not barred by limitation will... apply even when the plaintiff happens to be the *zemindar*."

As it had been held that the village was an agricultural village but two-thirds of the inhabitants were said to have been non-agriculturists, Chamier, J., remarks there being no proof and no ground for presuming that the *zemindar* had been in possession of the land at any time during the last 40 years or that the defendants or their predecessor held under him in any sense, and

(1) 11 Ind. Cas. 52; 8 A. L. J. 877; 33 A 57.

*Page of 8 A. L. J.—[*Ed.*]

I think that the case might have been disposed of on that ground.

On the findings of both the Courts below in this case it is quite clear that it is not a case where the origin of the occupancy of the defendant is unknown. It is known definitely that it was occupied at one time by a person who was not a tenant or *raiyat* of the *zemindar*. Furthermore, it is known that at no time the plaintiff had actual possession of it. At no time has the defendant or his predecessors acknowledged the title of the *zemindar* or paid any rent. Assuming, therefore, that the mere attestation by Shib Dayal did not entitle the Court to raise the presumption that he was aware of the contents of the document which expressly stated that absolute ownership was being transferred; the suit cannot succeed. That recital at any rate shows that the occupation of Babu Lachmandas and his transferee was not in the capacity of a licensee. The view taken by the learned Munsif was correct and we must allow this appeal and setting aside the order of remand restore the decree of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 47 OF 1924.

April 4, 1925.

Present:—Mr. Findlay, Officiating J. C.

KESHEO—DEFENDANT No. 3—APPELLANT

versus

VITHAL AND OTHERS—DEFENDANTS NOS. 1 AND 2 AND PLAINTIFFS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 5—Letters of Administration, grant of—Will—Proof required—Admission, qualified, of testator's signature—Burden of proof, whether shifted—Delay in making application, effect of—Forgery and fraud, allegations of.

Before the grant of Letters of Administration with the Will annexed the Judge should insist on strict proof of not only that the testator signed the Will and was in his senses at the time but also that he understood the contents of the Will. For this purpose proof should ordinarily be forthcoming that the Will, if not written by himself, was read over to him. [p. 469, col. 2.]

It is not possible to enunciate any specific standard of proof which will be required to establish the authenticity of a Will in any given case, everything depends on the circumstances of the particular case under consideration and in any such case it is incumbent on the person propounding a Will to produce proof of a nature which the circumstances of the case indicate as proper and necessary. [*ibid.*]

Tara Chand Chuckerbutty v. *Deb Nath Roy*, 10 C. L. R. 550, referred to.

A Will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. In case of doubt and dispute with regard to the testator's signature justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect. [p. 469, col. 1.]

A qualified admission by a party about the signature of the executant of a Will does not shift on to him the burden of proof that the Will was not executed. [p. 470, col. 1.]

Ram Gopal Lal v. *Aipna Kunwar*, 69 Ind. Cas. 31; 44 A. 495 at p. 500; (1922) A. I. R. (P. C.) 366; 31 M. L. T. 277; 27 C. W. N. 485; 21 A. L. J. 402; 1 Pat. L. R. 273; 49 I. A. 413 (P. C.) and *Devidas* v. *Mamooji*, 78 Ind. Cas. 104; 20 N. L. R. 7; (1924) A. I. R. (N.) 103, referred to.

The delay in making an application for Probate is a circumstance to be taken into account in determining as to whether the Will is genuine. [p. 472, col. 2.]

Gnanamuthu Upadesi v. *Vana Koilpillai Nadan*, 17 M. 379; 6 Ind. Dec. (N. S.) 263, referred to.

In a case where a forgery or fraud is alleged, it is almost impossible to prove the same by actual direct evidence, and all the person alleging it can do is to give evidence of the circumstances, from which a reasonable presumption arises that something of the sort has occurred. [p. 473, col. 1.]

Appeal against the judgment of the Additional District Judge, Nagpur, dated the 13th September 1923, in Civil Suit No. 38 of 1924.

Mr. *M. R. Bobde*, for the Appellant.

Sir *B. K. Bose* and Mr. *G. R. Deo*, for the Respondents.

JUDGMENT.—The appellant, Kesheo, is the eldest son of one Sitaram Pant who died on the 21st of December 1920. The first three respondents—Vithal, Pandurang and Pundalik—were the plaintiffs in the lower Court, while the 4th and 5th respondents *Musammat* Janki Bai and Laxman are respectively the widow of Sitaram Pant and the son of Ganpati, a deceased brother of Sitaram Pant. Vithal, Pandurang and Pundalik applied for Letters of Administration with reference to an alleged Will of Sitaram, said to have been executed on the 18th of December 1920, under circumstances which are clear from the judgment appeal-

ed against, and the appellant, Kesheo, has now come up in appeal against the said judgment.

The learned Additional District Judge found that the Will in question had been duly executed by the testator Sitaram, while he was in full possession of his mental powers, and that the execution of the Will had been duly attested, and this finding I am mainly concerned with in the present appeal.

The Will in question is Ex. P-15 and is in English. The case is somewhat peculiar in that the present appellant admitted in the lower Court that the signature "Sitaram" on the Will was the genuine signature of his father; the rest of the Will was denied. The theory advanced in this connection by the appellant was that Sitaram had to recover certain debt from S. K. Barlinge, that P. W. No. 3 Harinath Buxy brought a blank piece of paper to Sitaram during his illness, and that this piece of paper was subsequently used for the purpose of forging a false and fraudulent Will. It has been advanced on behalf of the appellant that a different standard of proof applies in connection with the proving of a Will in a case of the present nature. I have been referred to the remarks of their Lordships of the Privy Council in *Ram Gopal Lal* v. *Aipna Kunwar* (1) where the following passage occurs:—

"Their Lordships pause here in the recital of the facts, for the purpose of pointing out what is required for proof of a Will. A Will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. In the present instance, no formalities are essential. Proof of the testator's signature is all that is needed; but, in case of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect. In the present case, as has been stated, seven witnesses purported to have attested the testator's signature. Their signatures as found on the document are these: 'Ramkumgar Singh Bechu Singh; Ishar Singh Manager of Bari Sanghat, Benares; Sri Mahant Makund Singh Akali, Manager of Sir Hamidar Takht, Patna; Jageshar, resident of Surahi; Maheshri Dat Patak, resident of Jamalpur; Kali Charan Lonia, resident of Surahi.'"

The said passage is not, however, peculiarly apposite in the present instance, because here the signature is admitted, at least so far as the word "Sitaram" is concerned.

In *Kuppayammal* v. *Ammani Ammal* (2), Shephard, O. C. J., and Benson, J., pointed out that before the grant of Letters of Administration the Judge should insist on strict proof of not only that the testator signed the Will and was in his senses at the time but also that he understood the contents of the Will. It was further suggested that for this purpose proof should ordinarily be forthcoming that the Will, if not written by himself, was read over to him. A slightly less exacting standard of proof was indicated in *Jarat Kumari Dassi* v. *Bissessur Dutt* (3). It seems to me impossible, however, to enunciate any specific standard of proof which will be required to establish the authenticity of a Will in any given case. Everything depends on the circumstances of the particular case under consideration, and in any such case it is incumbent on the person propounding a Will to produce proof of a nature, which the circumstances of the case indicate as proper and necessary: *cf. Tara Chand Chuckerbutty* v. *Deb Nath Roy* (4). It remains to decide whether in the peculiar circumstances of the present case the latter standard has been complied with.

It has been suggested on behalf of the respondents that in view of the present appellant's admission that the word "Sitaram" had been written by the deceased himself, the burden of proving the non-execution of the Will shifted on to the present appellant. I cannot accede to the proposition. In the first place, there has not been an unqualified admission of the signature as a whole. The signature as a whole reads as "Sitaram Sambhau". Now, in the present

(1) 69 Ind. Cas. 31; 44 A. 495 at p. 500; (1922) A. I. R. (P. C.) 366; 31 M. L. T. 277; 27 C. W. N. 485; 21 A. L. J 402; 1 Pat. L. R. 273; 49 I. A. 413 (P. C.).

(2) 22 M. 345; 8 Ind. Dec. (N. S.) 216.
(3) 13 Ind. Cas. 577; 39 C. 245; 16 C. W. N. 265.
(4) 10 C. L. R. 550.

case the principle enunciated in *Devidas* v. *Mumooji* (5) undoubtedly applies and I am unable to accede to the suggestion that the very qualified admission made by the present appellant regarding the signature "Sitaram" in any way shifted the burden of proof on to him: *cf Ram Gopal Lal* v. *Aipna Kunwar* (1).

I now turn to examine the actual circumstances under which the Will was executed. The Will itself (Ex. P-15) is admittedly not a holograph At the best, only Sitaram's signature appears thereon and that signature is not even dated, the date having obviously been inserted by the person who drafted the body of the Will. There are other highly peculiar and significant circumstances in connection with this document. It is not imperative that the name of the scribe of the Will should be inserted therein, but it is a very ordinary circumstance in documents of this sort in India to find that this is done, and the curious fact is that an attesting witness Nagorao (P. W. No. 1) professes ignorance as to who the scribe of the Will was. The other attesting witness Venkatesh (P. W. No 2) also stated that he did not know who the scribe of the Will was He gave directly contra lictory evidence in Civil Suit No. 118 of 1923 in the Court of the Second Subordinate Judge, Second Class, Nagpur, to the effect that Harinath Buxy (P. W. No. 3) had scribed the Will. Such a contradiction is very striking in the circumstances and suggests some disquieting reflections regarding the attitude of an all important witness like this. The widow of the deceased, *Musammat* Janki Bai (P. W. No 12), would have us believe that Sitaram himself wrote out the Will. It is a curious fact that Harinath Buxy (P. W. No 3), who had been a petition-writer himself all his life and, as I have shown, is mentioned in Ex. III-D, 10 as the scribe of the Will, denies that this was so. There would certainly seem in the present case to have been a desire on the part of the first three respondents to conceal the identity of the scribe. If forgery or manipulation there was, this reluctance to reveal the name of the scribe can be very well understood. It is extremely curious, therefore, to find that now the person who takes the responsibility for scribing the Will is Wamanrao Govardhan (P. W. No. 10), who was only a student in 1920. Why a lad of this description should have been chosen for the purpose when an experienced petition-writer like Harinath Buxy was available, remains a mystery. He, however, it is extremely disturbing to find, does not take unqualified responsibility. His story is that Gannatro, the younger brother of Sitaram Pant, gave him a draft of a Will to copy. The witness made a copy, which was not intended to be the final deed but was to be further copied by some other person. This witness does not associate himself with the execution of the Will by Sitaram Pant or with the signatures of the attesting witnesses.

It is difficult, indeed, to understand the cloud of mystery which surrounds this aspect of the affair. If the evidence of Wamanrao Govardhan (P. W. No. 10) is true, *viz.*, that the draft was not intended to be the final draft, why should he have dated it in the formal way he did? It is curious also that if the evidence of P. W. No. 10 in this connection is truthful, why the formal expression that the testator was in a sound state of mind should appear in the draft The inclusion of this and the dating of the Will certainly suggest very strongly that the Will was intended to be executed there and then at the time when P W No 10 wrote it out. The attitude of Harinath Buxy (P. W. No. 3) and Wamanrao (P W. No. 10) is, in short, in my opinion, highly unsatisfactory. They strike me as persons most careful, not to commit themselves, and reading between the lines of their evidence, it would appear that either they are suppressing essential facts, or are giving a garbled version of the whole transaction.

The difficulties about the acceptance of this Will as a genuine one, under the circumstances alleged by the younger sons of Sitaram, do not end with the above. Vithal (P. W. No. 8) was, if the Will be a genuine one, a vitally interested party. He was in 1920 aged 20 and it is little less than extraordinary that he should profess to have only learnt afterwards of the fact of his father having executed the Will This strikes me as an extremely unlikely circumstance and the obvious suggestion is that it found convenient to arrange for these witnesses to feign ignorance of the circumstances, under which the Will was prepared, so as to avoid introducing possible confusion into the evidence thereanent.

(5) 78 Ind Cas. 104; 20 N. L. R. 7; (1924) A. I. R. (N.) 103.

The next material point I desire to allude to concerns what occurred before the Will is said to have been executed. P. W. No. 10 Wamanrao's story is that he prepared Ex P-15 from a draft given him by Ganpatrao. Very unfortunately this draft is not forthcoming. What is produced is a letter, dated 8th December 1920 (Ex. P-14), sent to Mr. Ghate, a Pleader in Akola. That letter states that Sitaram was in bad health, that there had been a quarrel with Kesheo, and that Sitaram wanted to arrange for the Will being executed, by which Kesheo would be practically disinherited. Mr. Ghate was accordingly asked to prepare a draft Will. The evidence for the plaintiff-respondents goes to suggest that Sitaram, who was the manager for Gopalrao Kesheorao Buty, was upto the last able to dispose of the papers relating to that business. It is curious, therefore, to find that it was Harinath Buxy (P. W. No. 3) who wrote the letter in question to Mr. Ghate. In the case of such an important document, even if it were assumed that Sitaram was not in a physical state to write the text of a letter like P-14, one would have expected to find that at least the letter issued in his name and was signed by him. Mr. Ghate's evidence is that he prepared the draft Will on the instructions contained in Ex. P-14, only leaving blanks for proper names and details of property. I find it extremely difficult to understand how a legal practitioner could have prepared the draft of the very vague and general instructions contained in P-14. If P-14 were in reality the real basis of the Will, the Will (Ex. P-15) would have been much less specific and thorough-going than it is. The witness Mr. Ghate has been at great pains to preserve the letter (Ex. P-14), but it is peculiarly unfortunate for the plaintiff respondents, if their case be a true one, that similar care has not been taken by them or by anyone else interested to produce the draft prepared by Mr. Ghate.

There are many other difficulties before the story of the plaintiffs can be accepted as regards the circumstances under which this Will (Ex. P-15) was executed. It is true that registration is not compulsory, but in the case of educated persons like those, who have to deal with, it is highly significant that no steps were taken to have an all important document like this registered. I am not much impressed by the argument that Sitaram was *prima facie* unlikely to have made a Will at the time he did. Although he was apparently conscious and in possession of his senses, it is clear that he realised that his state of health was bad. He was apparently suffering from dropsy and was a man of over 55 years of age. On the other hand, I do not think the plaintiffs' evidence has very satisfactorily established the fact that there had been an open or very serious breach between Kesheo and his father. In the plaintiffs' written statement dated the 2nd of August 1923 it was stated that Kesheo only occasionally came to his father's house and did not show his face there during the last 4 or 5 days of his illness. The impression, which the plaintiffs wish us to have of the bad relations in existence between Kesheo and his father, is not borne out by their own evidence. Janki Bai (P. W. No. 12) says that there was a quarrel between Kesheo and Vithal some 10 or 12 days before Sitaram died. I do not suppose for a moment that this is a false assertion, but a quarrel between Kesheo and Vithal would not necessarily mean a quarrel between Kesheo and his father. Janki Bai's evidence in this connection is clearly not reliable, for, if she could be believed, Sitaram told Kesheo that he had disinherited him at least a week before the Will was executed. And again, if this quarrel were the final straw, which induced Sitaram to disinherit Kesheo, the letter (Ex. P-14) to Mr. Ghate must have been written, if Janki Bai's evidence is correct, before the quarrel took place. According to her, the date of the quarrel must have been about the 10th of December, while according to P. W. No. 4 the date would have been the 6th idem.

Again, it appears from the evidence of Nagorao (P. W. No. 1) that Kesheo performed his father's obsequies and lived in the house during the period of mourning. This point is also deposed to by Wamanrao (P. W. No. 10). If Kesheo had already been disinherited some 3 days before his father's death, it is almost impossible to believe that the news would not have reached him in some form or other and, if it had, it is difficult to suppose that he would have gone on playing the part of a normal dutiful son in the way the plaintiffs' evidence itself shows he did.

Another suggestion made on behalf of the plaintiffs is that Kesheo had taken to the worship of another deity "*Datta*" and that this had caused friction between the

father and the son. The widow's own evidence suggests that this explanation of the alleged friction is a very far fetched one. She herself admits that Sitaram used to go to "*darshan*" and to dine in the new temple of "*Datta*", and even if this had been the cause of the trouble it had occurred 4 or 5 days before. In that event we should have expected to find Sitaram disinheriting Kesheo then and there.

Again, we have on record the power of attorney granted by Sitaram on 11th September 1916 in favour of Kesheo. This has never been cancelled. If there had been an open rupture between the father and the eldest son of the kind suggested, I should certainly have expected to find that he would have taken action to cancel this document also. He was a business man, apparently of intelligence, and he could not have anticipated on the date of the execution of the Will that he would necessarily die within three days. Under these circumstances I should certainly have expected to find that he would have taken immediate steps to cancel an important document like III D-2 which left very considerable powers in the hands of the son who was, on the plaintiffs' theory, to be disinherited.

The internal evidence furnished by the context of the Will itself is also, in my opinion, not very helpful to the plaintiffs' case. The Will is extremely laconic about the reasons for the disinheriting of Kesheo. The provision that he is to be given Rs. 3,000 payable in 25 instalments of Rs. 120 each is on the face of it a most extraordinary one. The payments are to begin from any year, which the present lessees (Vinayakrao and Nagorao) care to appoint on this basis, therefore, the payment can apparently be postponed to the Greek Kalends. If this document had been executed by a father, who, while he felt himself obliged to disinherit his eldest son was nevertheless prepared to make some effective provision for him. I should not have expected the provision to be of the illusive nature which the one in question is.

Great emphasis has been laid by the learned Counsel for the respondents on the fact that the mother's evidence entirely supports their case. When disputes arise in a family, it is almost inevitable that such a parent should take one side or the other. It is significant that she admits that there was friction between her and her daughter-in-law (Kesheo's wife) and I should not be surprised if the genesis of the friction which has led to the present proceedings were to be found in this incident rather than in a quarrel between Sitaram and Kesheo over the matter of deity worship. I would point out, moreover, that Janki Bai has overdone her support to younger sons and has gone in her evidence in certain instances further than the plaintiff-respondents went in their pleadings. I have been asked to treat her evidence as true because she, unlike others, denies actual direct knowledge of the execution of the Will. But the obvious reply on behalf of the appellant is that in the peculiar circumstances of the case there would have been a risk of introducing confusion into the evidence if she also had professed knowledge of the circumstances under which the Will was executed.

Still, another circumstance has been taken into account in connection with the authenticity of this Will. The Will was executed on 18th December 1920, but no application for Probate or Letters of Administration was made until some two years later. The delay in making the application is certainly a circumstance to be taken into account in a case like the present: *cf. Gnanamuthu Upadesi* v. *Vana Koilpillai Nadan* (6). In view of the contents of the Will Ganpatrao would have been the obvious person to have come forward and asked for Probate. But it is clear that he kept silent for some time and unfortunately, in the meantime has died. It is no doubt true that the Will was produced in the mutation proceedings but that was after all a subsidiary matter and the fact remains that real effective action to have the Will put into force was only taken two years after it had been executed.

Again, in this case we have the evidence of a reputable witness like Kesheorao Tambhan (D. W. No. 1) who was an intimate friend of Sitaram and saw him on the day before he died Sitaram mentioned his business affairs to him including the matter of the money he desired to recover from Mr. Barlings, Pleader but never mentioned the fact of his having executed a Will and disinherited Kesheo. This strikes one as extremely surprising. The only explanation offered on behalf of the plaintiff-respondents in this connection was that probably

(6) 17 M. 379; 6 Ind. Dec. (N. S.) 263.

Sitaram did not like to trouble intimate friends like the gentleman mentioned and Yadorao (D. W. No. 2) about such an unpleasant matter. If, however, the plaintiff's case were a true one, Sitaram had already taken the essential unpleasant step, *viz.*, the actual act of disinheriting Kesheo, and in those circumstances should have naturally expected to find a man of his type explaining to his intimate friends why he had taken the action he had. The evidence of Govindrao (D. W. No. 5) and Vishwanath (D. W. No. 6) also goes strongly to support the theory of the appellant that there was no serious friction between Kesheo and his father.

In a case where a forgery or fraud is alleged, it is almost impossible to prove the same by actual direct evidence, and all the person alleging it can do is to give evidence of the circumstances, from which a reasonable presumptirn arises that something of the sort has occurred. In the present case the appellant has admitted the signature "Sitaram" is that of his father, but has advanced a theory that a blank paper so signed had been utilised for the purposes of forging a Will in Sitaram's name. I have examined at length the circumstances of the case and it seems to me that the alleged transaction of the Will is shrouded in doubt and mystery. The exact circumstances under which the draft was prepared in consequence of a letter sent to a Pleader in Akola, are highly mysterious. The original draft which he prepared is not forthcoming. We have the evidence of an attesting witness contradicting himself in different Courts as to who was the scribe of the Will, and the alleged actual scribe Wamanrao (P. W. No. 10) is not willing to take the responsibility of saying that his draft was the final one. The part which Harinath Buxy (P. W. No 3) played in the matter is also far from clear and is shrouded in mystery and suspicion. The internal contents of the Will also, as I have shown, are also such as tend to throw doubt on its authenticity. I have omitted to mention another circumstance in connection therewith there is a most significant omission therein, *viz.*, that no provision has been made for the deceased's daughter-in-law, the widow of a pre-deceased son.

It seems unnecessary for me to formulate theory as to who were responsible for the forging of this Will, if it be a forged document. What I have to determine is whether it has been established beyond reasonable doubt that Sitaram duly executed this Will. For the reasons already given I am not satisfied on this point and a very large margin of doubt remains to the effect that this Will has been brought into existence subsequently to Sitaram's death by interested parties, who possibly took advantage of the fact that there was a certain amount of friction, at any rate, between Kesheo and his brothers. I do not think therefore, that the plaintiff-respondents have sufficiently discharged the burden which rested on them to prove the authenticity of this Will.

For the above reasons the judgment of the lower Court is reversed and the application for Letters of Administration filed by the first three respondents is dismissed. The respondents must bear the appellant's costs in this Court as well as their own, while in the lower Court the plaintiff-respondents will bear defendant No. 3's costs incurred there.

G. R. D. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 18 OF 1924.

April 6, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

WAJID ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SALIMA BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Assertion of title on basis of gift by deceased—Limitation.

Where a person who is not the heir of a deceased Muhammadan obtains possession of a portion of the property belonging to the deceased under an assertion of title on the basis of a gift, his assertion is a sufficient disclaimer of the title of the heirs of the deceased and sets limitation in motion against them. Possession of the property under these circumstances for a period of twelve years after such assertion of title extinguishes the title of the rightful claimants of the property even though the gift alleged by the person in possession is not proved. [p. 472, col. 2; p. 473, col. 1.]

First appeal from the judgment and decree of the Subordinate Judge, Bahraich, dated the 29th November 1923.

Mr. *Ali Mohammad*, for the Respondent.

JUDGMENT.—This is the plaintiffs' appeal. The suit out of which it arises was

for possession of 6 annas 10-2/7 pies share in village Santher, *Pargana* Nanpara in the District of Bahraich.

The aforementioned village belonged in its entirety to one Musahib Ali in under-proprietary tenure. The superior proprietor of the village is the *taluqdar* of Tapraha. Musahib Ali died on 16th September 1896. His heirs under the Hanafi Muhammadan Law were his widow, *Musammat* Mariyam, the plaintiffs Nos. 1 to 5, and Nawab Ali, defendant No. 2, sons of Akbar Ali a brother of Musahib Ali, and also one Saadat Ali, plaintiff's brother since deceased

On the death of Musahib Ali the *taluqdar* of Tapraha brought a suit for possession of the village as against *Musammat* Mariyam. That suit failed in the Court of first instance and during the pendency of the appeal from the decree of that Court *Musammat* Mariyam died on the 18th September 1900. On the application of the *taluqdar* the nephews of Musahib Ali, whose names have been stated before, were made the legal representatives of the deceased Mariyam. The defendant No. 1 to the present suit, *Musammat* Salima is a niece of *Musammat* Mariyam. She also applied to be made a party to the appeal on the allegation that the deceased lady, *Musammat* Mariyam, had made a gift of the property in suit to her. This application was made on the 26th September 1900. With the consent of the then appellant *Musammat* Salima was also impleaded a party respondent to the appeal. The appeal was eventually dismissed.

The plaintiffs' case is that under a family settlement as well as under a family custom *Musammat* Mariyam was in possession of the village for her lifetime, and on her death the reversionary interest under the same settlement and the same custom devolved upon the heirs of her deceased husband Musahib Ali. On the death of Mariyam, however, *Musammat* Salima took unlawful possession of half of the village and the other half was in the possession of the defendant No. 2, who is the brother of the plaintiffs.

In the year 1911, the plaintiffs and the *taluqdar* applied to the Court of Revenue for the entry of their names in the revenue registers. *Musammat* Salima objected to this application. The decision of the Court was that the then existing entry in respect of half of the village which was made immediately after *Musammat* Mariyam's death in favour of *Musammat* Salima shall stand unaltered, while the entry of the name of the defendant No. 2 in respect of the other half of the village shall be altered by adding the names of the plaintiffs to the name of the defendant. The latter alteration was accordingly made in the *khewat*.

The present suit is mainly directed to obtain possession of the eight-annas share which is held by *Musammat* Salima, and it is said that Nawab Ali defendant No. 2 having refused to join in the array of the plaintiffs was made a defendant in the suit.

For the purposes of this appeal the only defence, which need be stated, was that the share in the possession of *Musammat* Salima has been held adversely by her for a period of more than twelve years and that consequently the plaintiffs' suit is barred by limitation under Art. 144 of the First Schedule of the Indian Limitation Act.

The Trial Court has held that the case set up by the plaintiffs as to the family custom and the family settlement was not established and it has further held that the plea of adverse possession raised by the defendants was established. In the grounds embodied in the memorandum of appeal to this Court objection is made against the decision of the Court of first instance on the last mentioned plea only.

I am of opinion that the decision of the lower Court is correct. The plaintiffs argue that they and *Musammat* Salima are co-sharers and that, therefore, her exclusive possession cannot be construed to be adverse to the plaintiffs' title without a complete disclaimer and ouster. There is no such disclaimer or ouster established in the case.

In the first place there is no foundation in the present case for the contention that the plaintiffs and the defendant No. 1 stand in the relationship of co-owners in the eight-annas share in the possession of the latter. The plaintiffs are the heirs of Musahib Ali who died, as already stated, so far back as the year 1896. *Musammat* Salima defendant No. 1, is not amongst the heirs of Musahib Ali. She is an heir under the Muhammadan Law to the estate of her aunt *Musammat* Mariyam in which estate the plaintiffs have no interest whatsoever.

In the proceedings for substitution of names in the appeal, mentioned at an earlier portion of this judgment, after the death of *Musammat* Mariyam on the 18th September

1900, *Musammat* Salima, defendant No. 1, claimed title to the estate of *Musammat* Mariyam on the basis of a gift. Though the issue as to the gift now raised has failed, yet the assertion of title made on the basis of that gift in the year 1900 by the defendant *Musammat* Salima was a sufficient disclaimer of the plaintiffs' title and set the limitation in motion. The decision of their Lordships of the Privy Council in the case of *Varada Pillai* v *Jeevarathnammal* (1) covers the case before me altogether. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 53 Ind. Cas. 901; 46 I. A. 285; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 43 M. 244; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1212 OF 1923.

January 28, 1924.

Present:—Mr. Justice Campbell.

BEHARI LAL—PLAINTIFF—APPELLANT

versus

BALMOKAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Redemption and Foreclosure Regulation (XVII of 1806), s. 8—Mortgage—Foreclosure—Notice, service of, proof of—Burden of proof.

There can be no presumption in law that a foreclosure notice under Bengal Land Redemption and Foreclosure Regulation XVII of 1806 is regular and a party who relies upon foreclosure proceedings having effected forfeiture of the estate of a mortgagor must prove affirmatively the due performance of every condition necessary to be established under the Regulation. Unless the party who sets up due service of the notice under the Regulation proves affirmatively that actual demand of payment was made from the mortgagor before an application for foreclosure was made, the notice must be held to be a nullity. [p. 475, col. 2; p. 476, col. 1.]

Sochet Singh v. *Dial Singh*, 46 P. R. 1907; 122 P. W. R. 1907; 192 P. L. R. 1908, followed.

Second appeal from a decree of the District Judge, Amritsar, dated the 26th February 1923, affirming that of the Munsif, First Class, Amritsar, dated the 6th July 1921.

Lala *Badri Das*, R B , for the Appellants.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The plaintiff on the 13th of March 1919 sued to redeem a mortgage of a house effected on the 9th of March 1901 by the father of his assignors defendants Nos. 3 and 4 in favour of defendant No. 2 and was met among other pleas with the assertion that the mortgagee had served the plaintiff's predecessors-in-interest with notice under Regulation XVII of 1806 on the 9th of February 1918 and that the plaintiff not having brought his suit within one year from that date had lost his right to redeem.

The plaintiff denied that notice had been served or that the notice was valid. The Trial Court struck the general issue "whether the plaintiff's suit is within time" with onus on the plaintiff, and refused to listen to objections by the plaintiff's Counsel that the alleged notice was invalid, saying that these should be put forward in a separate proceeding of objections before the Court which issued the notice. The suit was dismissed and the order of dismissal was upheld by the District Judge.

The plaintiff has come to this Court on second appeal. The learned Counsel for the respondents admits that the Trial Court took a wrong view of the law in ruling out objections to the validity of the notice in the suit before him. He contends, firstly, that the plaintiff did not, as he should have done, specify exactly in what respects the notice was invalid, and, secondly, that in his appeal to the District Judge the plaintiff did not raise the question of irregularity or invalidity of the notice.

In regard to the first point the plaintiff re-joined the defendants' written statement that the alleged notice was not regular or legal and added that he had made objections to that effect in the Court which issued the notice. This plea was sufficiently explicit and, as pointed out in *Sochet Singh* v. *Dial Singh* (1) where several other authorities were discussed, the law is that there can be no presumption in law that a foreclosure notice under the Regulation is regular and that the party who relies upon foreclosure proceedings having effected forfeiture of the estate of a mortgagor has to prove affirmatively the due performance of every condition necessary to be established under the Regulation. For instance it has been laid down repeatedly that, unless the party who sets up due service of a notice under Regulation XVII proves affirmatively that actual demand of payment was made from the mortgagor before application was made for

(1) 46 P. R. 1907; 122 P. W. R. 1907; 192 P. L. R. 1908.

the foreclosure, the notice must be held to be a nullity.

As for the second point it appears to me that the learned District Judge fell into the same error of law as did the Trial Court and in any case his judgment states that the plaintiff had urged that service of the notice had not been proved to have been duly effected.

The plaintiff-appellant asks for no more than that the suit should be sent back for re-trial and this must be done. I accept the appeal, set aside the orders of the Courts below and direct that the defendant Balmokand be required to prove that every requisite formality was fulfilled in connection with the foreclosure notice alleged to have been served on the plaintiff as well as that the notice was actually served and that after decision of this and of any other issues that may arise a fresh decision be ordered by the Trial Court.

Costs in this Court will be costs in the suit.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEALS NOS. 62 AND 63 OF 1924.

March 25, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Musammat MAHARJI—DECREE-HOLDER—APPELLANT

versus

RAGHOMAN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—Mortgage-decree—Personal liability of father—Interest of sons, whether can be sold.

A mortgage-decree passed on a compromise provided that if the decree was not fully satisfied out of the sale-proceeds of the mortgaged property the balance of the decretal amount may be recovered from the mortgagor personally or from the assets of the mortgagor in the hands of his sons. The sale-proceeds of the mortgaged property proved insufficient to satisfy the decree and the decree-holder sought to execute the decree by sale of other property belonging to the mortgagor and the sale of the interest of the sons of the mortgagor in such property:

Held, (1) that the interest of the mortgagor in joint family property could be sold in execution of the decree obtained against him personally; [p. 477, cols. 1 & 2.]

(2) that the interest of the sons of the mortgagor in joint family property could also be sold in execution of the decree inasmuch as the debt incurred was their father's and it was not shown that it was either immoral or illegal. [p. 477, col. 2.]

Miscellaneous appeal against an order of the District Judge, Fyzabad, dated the 1st August 1924, reversing that of the Subordinate Judge, Fyzabad, dated the 24th January 1924.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *B. N. Srivastava*, for the Respondents.

JUDGMENT.—At the hearing of these appeals to-day the learned Advocate, who appeared on behalf of the respondents at the last hearing of the appeals, stated that he had had no instructions on behalf of his clients to put in appearance at to-day's hearing. I will now proceed with the decision of the appeals.

The two appeals arise out of a single application for execution of a decree obtained by the appellant on the 29th May 1918 from the Court of the Subordinate Judge of Fyzabad. The suit in which this decree was obtained was instituted on the basis of a deed of mortgage dated the 22nd August 1911 executed by Bhagirathi and his brother, Mahadeo. The mortgage was a simple one and the property which was made security for the loan was an 8-annas share of a 89 *bighas* 5 *biswas* under-proprietary tenure. Mahadeo had died before the institution of that suit and the decree was obtained as against the surviving mortgagor, Bhagirathi, and the six sons of Mahadeo, Raghoman and five others. The decree was founded on a compromise and was for a sum of Rs. 2,663. The terms of the compromise were that the amount claimed was to be recovered by the sale of the 2 annas share out of the 8 annas mortgaged under the deed and the remaining 6 annas of the same share were exempted from the operation of the mortgage and that in case the decree was not fully satisfied out of the proceeds of the sale of the 2 annas the balance of the decretal amount was to be recovered from "the mortgagors personally or from the assets of the mortgagor in the hands of his sons." The contingency contemplated by the compromise did happen and consequently after the sale of the said 2 annas the mortgagee decree-holder proceeded to attach and sell the remaining 6 annas share which was exempted from the effect of the mortgage under the terms of the compromise mentioned above in satisfaction of the

balance of the decretal amount. This attempt of the decree-holder finally failed under an order of this Court.

On the 31st May 1923 the decree-holder filed the application, out of which these appeals arise, for execution of the decree with a view to realize the amount of money which had remained unsatisfied under the previous sale. Her prayer is that the other 8-annas share be attached and sold and the sale proceeds be utilized in satisfaction of the balance of the decretal amount. The application was resisted by the six sons of Mahadeo and by Bhagirathi but the resistance failed in the Court of first instance and the execution of the decree by attachment and sale of the second half 8-annas share was allowed to proceed. From the order of the Court of first instance two appeals were preferred to the Court of the District Judge of Fyzabad, one by the six sons of Mahadeo and the other by Bhagirathi. The learned District Judge accepted both the appeals and dismissed the application for execution altogether. Hence the two appeals before me by the decree-holder.

On an issue remitted by me it has been found that the 8-annas share now in question was the joint family ancestral property of Mahadeo, Bhagirathi and the six sons of Mahadeo burdened with a charge for the maintenance of *Musammat* Chaurasi, widow of one Hardat, who was the uncle of Mahadeo and Bhagirathi and a member of the joint family. The question, which I have, therefore, to decide is whether the interests, which Bhagirathi and the six sons of Mahadeo possessed in the 8-annas share in question as members of a joint Hindu family can be attached and sold by the decree-holder in satisfaction of his decree having regard to the terms of the compromise.

The compromise stated that the balance of the decree would be recoverable "from the mortgagors" personally or from the assets "of the mortgagor in the hands of his sons." This condition of the compromise is clearly divisible into two parts. So far as the personal liability is concerned, that is, made enforceable as against Bhagirathi and the second part of it is intended to be directed against the sons of Mahadeo and their liability is meant to be satisfied out of the assets which they might have received from their father, Mahadeo, after his death. Now so far as Bhagirathi is concerned, his interest in the joint family property can certainly be seized and sold in execution of a decree obtained personally against him as the present decree was. See the decision of their Lordships of the Privy Council in the case of *Deendayal Lal* v. *Jugdeep Narain Singh* (1). As regards the interests of the sons of Mahadeo in the 8-annas share in question, I am equally clear that that can also be seized and sold in execution of the decree now being sought to be executed. The original liability for which the decree was passed against the sons was their father's and it is not shown that the debt incurred under that liability was either immoral or illegal. The interest of the father in the joint family property, had he been alive, could certainly have been seized in execution of a decree against him and if that is so it follows that that interest is liable in the hands of his sons for the satisfaction of the same liability.

I, therefore, allow these appeals, set aside the order of the Court below and restore that of the Court of first instance with costs throughout.

Z. K. *Appeal allowed.*

(1) 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604: 1 Ind Dec. (N. S.) 715 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 241 OF 1924.

April 28, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

BONDRU—DECREE-HOLDER—APPLICANT

versus

MISRIYA, MINOR, GUARDIAN MR. K. K. GANDHE—JUDGMENT-DEBTOR—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 52—C. P. Tenancy Act (I of 1920), ss. 11, 12—Occupancy holding, non-transferable—Mortgage-decree—Sale of holding after death of judgment-debtor—Balance of sale-proceeds in hands of heir, whether assets of deceased tenant—Legal representative, liability of.

Where in execution of a mortgage-decree obtained against an occupancy tenant, a non-transferable occupancy holding of the judgment-debtor is sold after the death of the judgment-debtor, the surplus sale-proceeds paid to the legal representative of the judgment-debtor do not represent the assets of the deceased so as to be liable to attachment in execution of a money-decree passed against the legal representative of the deceased as representing the estate of the deceased. [p. 478, col. 2.]

In order to fasten liability on the heir-at-law or legal representative of a deceased person the right

which has devolved upon the legal representive must be property which can be disposed of for the purpose of satisfying the debt due by the deceased. [*ibid.*]

Succession to a non-transferable occupancy holding creates no personal liability upon the heir of the occupancy tenant to pay the debts of the deceased. [*ibid.*]

Revision against an order of the Small Cause Court, Khandwa, dated the 11th July 1924, in Miscellaneous Case No. 107 of 1924.

Mr. *S. B Gokhale*, for the Applicant.

Mr. *K. K. Gandhe*, for the Non Applicant.

ORDER.—Ratansing, grandfather of the non-applicant, had executed a mortgage for Rs. 1,000 on 8th April 1896 in favour of Fulchandsa Amolakchandsa mortgaging certain occupancy fields in Sulgaon and Songir Tahsil Khandwa. The mortgagees, after the death of Ratansing, sued his sons Bhika (father of the non-applicant) and Nathoo on the mortgage and obtained a preliminary decree for sale on 28th February 1911. This decree was made final on 23rd August 1912. Bhika died some time between 1921 and 1922 and Nathoo also died about the same time and in their place, non-applicant Misria son of Bhika was brought on the record as the legal representative of the judgment-debtors and in execution of the mortgage-decree, dated 23rd August 1912, the occupancy fields comprised in the mortgage-decree were sold for Rs. 1,730 on 12th December 1923. The sale was confirmed on 28th January 1924 and out of the sale-proceeds of the occupancy fields the amount due to the decree-holders under their mortgage-decree was ordered to be paid to them and the balance of Rs. 341-12-0 to the non-applicant.

It appears that non-applicant's father Bhika had executed a simple money-bond for Rs. 300 in favour of applicant Bondru and his brother Chunnilal on 16th December 1920. After Bhika's death, Bondru and Chunnilal brought a suit for Rs. 400 on the strength of the above bond against the non-applicant in the Court of Small Causes, Khandwa, and obtained a decree on 1st July 1924. In execution of this decree, the amount of Rs. 341-12 0 which was the balance of the sale-proceeds of the occupancy fields and which was lying in the hands of the Civil Court was attached. Non-applicant objected to the attachment on the ground that the money attached was not the property of Bhika in his (non applicant's) hands. The Small Cause Court allowed his objection and removed the attachment. Against this order, decree-holder, Bondru, has filed this revision petition.

Under the decree dated 1st July 1924, non-applicant was made liable for the decretal amount to the extent of the assets, if any, of Bhika in his hands and the question for consideration is whether the balance of the sale-proceeds of occupancy fields which were sold long after Bhika's death in execution of the mortgage-decree against him represents Bhika's assets in the hands of the non-applicant. My answer to this question is in the negative. As pointed out in *Nathmal* v. *Mattoo* (1) to fasten liability on the heir-at-law or legal representative, the right which has devolved must be property which can be disposed of for the purpose of satisfying the debt due by the deceased. Under s. 11 (2) of the Central Provinces Tenancy Act of 1920, no decree or order can be passed for the sale or foreclosure of any right of an occupancy tenant in his holding except in pursuance of a document registered before the 21st day of October 1898 nor can such right be attached or sold in execution of any decree or order nor can a Receiver be appointed to manage such holding under s. 51 of the C. P. C., nor can such right vest in the Court or in a Receiver under the Provincial Insolvency Act. It is true that under s. 12 (1) of that Act, an occupancy tenant can sub-let his holding for a year and can transfer it otherwise than by a simple mortgage to any co-tenant or person who, if he survived him without nearer heirs, would inherit his right. But it is an extremely limited right and is in some respects more restricted in its nature than even the right of a life-tenant and is in no case available even during the lifetime of the tenant for attachment and sale in satisfaction of his debts. As observed by Mitra, A. J. C., in the case referred above, to hold that succession to such an untransferable right of occupancy created a personal liability to pay the debts of a deceased judgment-debtor, would be opposed to principle and could scarcely have been intended by the Legislature : *cf. Kidarnath* v. *Ganeshamal* (2).

It is no doubt true that what was attached in this case was money and not the occupancy holding left by the deceased Bhika. But the money attached represents the price of the equity of redemption in the occupancy holding which devolved on the non-appli-

(1) 21 Ind. Cas. 272; 9 N. L. R. 137 at p. 139.

(2) 33 Ind. Cas. 711; 31 C. W. N. 1015.

cant after Bhika's death and as this right which was converted into money could not be available for attachment and sale in satisfaction of Bhika's debt, it follows that the money is equally unavailable for the statisfaction of such debt.

The order of the lower Court is correct and I dismiss this application with costs. Pleader's fee Rs. 10.

Z. K. *Appeal dismissed*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 592 OF 1923.

December 15, 1923.

Present:—Mr. Justice Moti Sagar.

RAMSARAN DASS—PLAINTIFF—PETITIONER

versus

THE FIRM RAM LAL-RAM LABHAYA THROUGH RAM LABHAYA AND THE DELHI CLOTH MILLS, DELHI, THROUGH MADAN MOHAN—DEFENDANTS—RESPONDENTS.

Practice—Commission, issue of—Failure to deposit Commissioner's fee—Procedure.

It is the duty of a Court before it issues a commission to see that the Commissioner's fee and the diet money of the witnesses have been duly deposited. Where, however, this is not done and a party declines to pay the Commissioner's fee and the diet money of witnesses, the proper procedure for the Court to adopt is to make the amount of the payment for which the party is liable, part of the costs of the suit and to enter it in the decree. The Court has no jurisdiction in such a case to direct that the amount should be realised from the party who is liable in respect of it by attachment.

Petition, under s. 25 of Act IX of 1887, for revision of an order of the Judge, Small Cause Court, Amritsar, dated the 6th 7th July 1923.

Mr. *M. L. Puri*, for the Petitioner.

JUDGMENT.—In this case a Commission was issued at the request of the petitioner for the examination of a certain witness at Delhi. The petitioner neither deposited the fee of the Commisioner nor the diet money of the witness. Several adjournments were granted by the Commosioner, and though the witness was present the petitioner failed to appear and examine him. The Commission was consequently returned by the Commissioner as unexecuted. The petitioner wanted the Court to re-issue the Commission, but this application was refused. In my opinion the learned Judge of the Court below, was fully justified in refusing to accede to this prayer, and no grounds have been made out for interfering with his order. It appears that on the date the application for re-issue of the Commission was refused, the Court also passed an order to the effect that the petitioner should deposit the fee of the Commissioner and the diet money of the witness in Court, and that if he failed to do so the money may be realised from him by attachment. This order appears to be wholly without jurisdiction and must be set aside. It has been held in *Tadhin Proshad Singh* v. *Sardar Coomar Narayan Singh* (1) that such an order should not be executed as a decree because the C. P. C. does not provide for the issue of any judicial process for realisation of the amount so ordered to be paid by one of the parties. It was the duty of the Court before the Commission was issued to see that the Commissioner's fee and diet money of the witness had been duly deposited. Now, if the petitioner at whose instance the Commission was issued declines to pay, the proper thing for the Court to do is to make the amount costs of the suit and enter it in the decree.

I accept the application and set aside the order of 7th of July 1923 only in so far as it directs the realization of the money by attachment.

Z. K. *Application accepted.*

(1) 10 C. W. N. 234.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 15 OF 1925.

April 8, 1925.

Present:—Mr. Dalal, J. C.

Raja MOHAMMAD MEHDI ALI KHAN—PLAINTIFF—APPELLANT

versus

LAL BAHADUR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Civil Procedure Code (Act V of 1908), O. XX, r. 7—Time requisite for obtaining copy—Decree, date of—Period between date of judgment and preparation of decree, whether can be excluded—Appeal—Limitation, computation of.

Time which need not have elapsed if an appellant had taken reasonable and proper steps to obtain a

copy of the decree cannot be regarded as time requisite for obtaining the copy within the meaning of sub-s. (2) of s. 12 of the Limitation Act. [p. 480, col. 2.]

The date of a decree must be considered to be the date of the judgment under O. XX, r. 7, of the C. P. C. and an appellant is not entitled in computing the period of limitation for filing his appeal to deduct the time which elapses between the date of the judgment and the actual preparation of the decree. [p. 480, col. 1.]

Appeal against an order of the District Judge, Fyzabad, dated the 17th November 1924, confirming that of the Assistant Collector, First Class, Sultanpur, dated the 25th September 1924.

Mr. *Wasi Hasan*, for the Appellant.

ORDER.—The learned District Judge of Fyzabad rejected the appellant's petition of appeal on the ground that it was presented beyond time. The judgment of the Trial Court was dated the 25th September 1924 and the decree was prepared on 30th September 1924. It was urged on behalf of the appellants that these six days should be deducted and excluded as time requisite for obtaining a copy. A ruling of the Calcutta High Court in the case of *Bani Madhub Mitter* v. *Matungini Dassi* (1) was quoted in support. Such, however, appears to be the practice in the Calcutta High Court and such practice cannot govern the practice of other Courts. Reference to this practice is made by their Lordships of the Privy Council in the case of *Pramatha Nath Roy* v. *Lee* (2). At page 1003* of the report their Lordships state: "It is then urged that there is an authority, decided in 1886, which has been the origin of a practice undeviatingly followed by the Courts in Calcutta in the interpretation of the Statute, and that practice is said to be that in determining what is the time requisite which may be deducted you are, in all cases, to look at the time that has actually elapsed in obtaining the order." No such practice prevails either in the Province of Oudh or in the sister Province of Allahabad. The appellant was well aware that the date of the decree would be considered to be the date of the judgment under O. XX, r. 7, C. P. C. He was, therefore, not under misapprehension of law by reason of any practice prevailing in this Province. Patna rulings quoted in the judgment of the lower Court are not reported in the authorised law reports. In this particular case the appellant is not entitled to any indulgence either. He only tried to cover up his negligence by taking advantage of the time spent in getting the decree prepared. The decree was admittedly prepared on 30th September 1924 but it was not till the 23rd of October that he applied for a copy. In the ruling of their Lordships referred to by me above it was laid down that the time which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain a copy, could not be regarded as requisite time with sub-s. (2) of s. 12 of the Indian Limitation Act. It is not explained why the appellant waited for 21 days before applying for a copy of the decree and for 9 days after the copy was ready before filing his appeal.

I dismiss this appeal.

Z. K. *Appeal dismissed.*

(1) 13 C. 104; 6 Ind. Dec. (N. S.) 568.

(2) 68 Ind. Cas. 900; 49 C. 999; 31 M. L. T. 193; (1922) A. I. R. (P. C.) 352; 4 U. P. L. R. (P. C.) 103; 43 M. L. J. 765; 27 C. W. N. 156; 21 A. L. J. 118; 37 C. L. J. 86; 18 L. W. 56; (1923) M. W. N. 526; 49 I. A. 307 (P. C.).

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ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 500 OF 1924.

May 20, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

SHIVA NATH PRASAD—PLAINTIFF—APPELLANT

versus

TULSHI RAM—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Mortgage executed by father—Immoral debt—Liability of sons—Interest of father, whether liable.

Under the Hindu Law the right, title and interest of a co-sharer in joint ancestral property can be attached and sold in execution to satisfy a decree against him personally. [p. 481, col. 2.]

Deendyal Lal v. *Jugdeep Narain Singh*, 3 C. 198; 4 I. A. 247; 1 C. L. R. 49; 3 Sar. P. C J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.), *Suraj Bunsi Koer* v. *Sheo Persad Singh*, 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), *Lachmi Narain* v. *Kunji Lal*, 16 A 449 at pp. 455, 456; A. W. N. (1894) 169; 8 Ind. Dec. (N. S.) 292 and *Chandra Sen* v. *Ganga Ram*, 2 A. 899; 1 Ind. Dec. (N. S.) 1165, followed.

A mortgage of family property was executed by a Hindu father. To a suit on the mortgage the mortgagee impleaded both the mortgagor and his son as defendants. On behalf of the son it was pleaded that the debt was tainted with immorality and that, therefore, the mortgage was bad and he was not liable to pay the debt. The Court upheld this plea and declined

to pass a decree for sale on the basis of the mortgage but passed a money-decree against the father personally. In execution of the decree the decree-holder sought to attach and sell the interest of the judgment-debtor in the joint family property including his interest in the property mortgaged:

Held, that the judgment-debtor's interest in joint family property was liable to be attached and sold in execution of the decree. [p. 481, col. 1.]

Karan Singh v. *Bhup Singh*, 27 A 16; 1 A. L. J. 310; A. W. N. (1904) 151 (F. B.), *Abdul Karim* v. *Ram Kishore*, 86 Ind. Cas. 837; 23 A. L. J. 196; (1925) A. I. R. (A.) 327; 47 A. 421, *Brij Narain Rai* v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) A. I. R. (P. C.) 50; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.), referred to.

Execution first appeal from a decree of the Additional Subordinate Judge, Gazipur at Ballia, dated the 5th of August 1924.

Messrs. *B. Mallick* and *Gulzari Lal*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This is an appeal by a Hindu son from a decree passed in execution against him. His father had made a mortgage in favour of the plaintiff-decree-holder and a suit was instituted against him impleading his minor son. On behalf of the son it was pleaded that the debt was tainted with immorality and, therefore, the mortgage was bad and the son was not liable to pay the debt. The Court found that the debt was proved to have been tainted with immorality and, therefore, declined to pass a decree for sale on the basis of the mortgage-deed but simply passed a money decree against the father personally. The decree-holder put the decree for money against the father in execution and attached the whole of the ancestral property including that which had been mortgaged. The Court below has allowed the objection of the son so far as the attachment of his interest in the property is concerned but has ordered execution against the interest of the father in the joint property. The son appeals to this Court and on his behalf it is contended in the first place that the effect of the previous decision was to make the entire family property free from all liability; and in the next place it is contended that in the face of the finding that the debt was tainted with immorality it is not open to the decree-holder to attach any portion of the joint ancestral property. We think that there is absolutely no substance in the first contention. All that the Court held was that in view of the finding on the question of immorality the mortgage was bad and, therefore, there had been no transfer of the property and no charge created. It passed a simple money decree against the father, but it did not, in any other way, hold that any ancestral property would never be liable to be sold in execution of the decree against the father.

The next contention also has no force. It was held by their Lordships of the Privy Council in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) that the right, title and interest of one co-sharer in a joint ancestral estate might be attached and sold in execution to satisfy a decree against him personally under the Law of Mitakshara. This principle was re-affirmed by their Lordships in the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), where at page 174* their Lordships observed that the previous decision had recognized the seizable character of an undivided share in a joint property. This case has been followed by this Court in the case of *Lachmi Narain* v. *Kunji Lal* (3) and in the case of *Chandra Sen* v. *Ganga Ram* (4). It seems to us that if the interest of the father alone can be seized in execution of a decree against him the question of the immorality of the debt does not arise. The son is not called upon to pay this debt nor is his property said to be attached and sold. He is entitled to get his interest in the joint property exempted. But it does not follow that he is also entitled to prevent the attachment and sale of the interest of his father against whom a decree is in force. In the Full Bench case of *Karan Singh* v. *Bhup Singh* (5), reference was made to an earlier Privy Council case and it was pointed out that if the son sought to escape from having *his interest* affected by the sale he had to establish that the debt he desired to be exempted from paying was of such a character that he as a Hindu son could not be under the pious obligation to discharge it. In a

(1) 3 C. 198; 4 I. A. 247; 1 C. L. R. 49; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 715 (P. C.).

(2) 5 C. 148; 6 I. A. 88; 4 Sar. P C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 745 (P. C.).

(3) 16 A 449 at pp. 455, 456; A. W. N. (1894) 169; 8 Ind. Dec. (N. S.) 292.

(4) 2 A. 899; 1 Ind Dec. (N. S.) 1165.

(5) 27 A. 16; 1 A. L. J. 310; A. W. N. (1904) 151 (F. B.).

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recent case of *Abdul Karim* v. *Ram Kishore* (6) the above mentioned Full Bench case was followed.

It is lastly contended that the observations of their Lordships of the Privy Council in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (7) conclude this point and make the entire estate free from liability in case the debt is contracted for immorality. We think that the propositions laid down by their Lordships do not cover the point now before us. The question whether the interest of one co-parcener can be attached and sold in execution of a decree against him was not a matter before their Lordships. The previous cases referred to above, therefore, still hold good. We are of opinion that this appeal has no force. It is accordingly dismissed with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

(6) 86 Ind. Cas. 837; 23 A L. J. 196; (1925) A. I. R. (A.) 327; 47 A. 421.

(7) 77 Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) A. I. R. (P. C.) 50; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; 33 M. L. T. 457; 46 A. 95, 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 26 OF 1925.

April 9, 1925.

Present:—Mr. Dalal, J. C.

Musammat SITABA—DEFENDANT—APPLICANT

versus

MATA DIN—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Application to set aside ex parte *decree—Security, failure to furnish, within limitation, effect of.*

The provisions of s. 17 of the Provincial Small Cause Courts Act are mandatory but are sufficiently complied with by satisfying the requirements of the section before the time prescribed for an application to set aside the *ex parte* decree in the Limitation Act has elapsed. Where, however, the deposit is made or the security is furnished after the expiry of the limitation for making an application to set aside the *ex parte* decree, it cannot be held that the provisions of the section have been complied with.

Application for revision under s. 25 of the Small Cause Courts Act against an order of the Subordinate Judge, acting as Judge, Small Cause Court, Barabanki, dated the 17th January 1925.

Mr. *Ram Charan*, for the Appellant.

Mr. *Tara Shankar*, for the Opposite Party.

JUDGMENT.—The Subordinate Judge of Barabanki dismissed the application of *Musammat* Sitaba for setting aside an *ex parte* decree against her and for rehearing on the ground that security for the performance of the decree was given more than a month after the decree was passed. The decree was passed while he was exercising the jurisdiction of a Court of Small Causes. Under s. 17 (proviso) of the Provincial Small Cause Courts Act an application for an order to set aside a decree passed *ex parte* has to be accompanied by a deposit in Court of the amount of the decree or security for its performance. When the application was presented on 28th July 1924 no money was deposited, nor security given. The Court ordered that first of all (*awalan*) security should be given and issued notice for the hearing of the application on the 27th September. The security was not filed till the 15th of September. No time was fixed by that Court but the words clearly indicate that the applicant was desired to file security within a reasonable time. Thirty days' period of limitation will appear to be a reasonable time and the security was filed more than two weeks after the expiry of such time. The lower Court is mistaken in thinking that the provision of s. 5 of the Limitation Act applies to an application like the present. That Court has not granted any indulgence and not extended the time, in reality it has no jurisdiction to do so.

A Full Bench of the Madras High Court has decided that the provisions of s. 17 of the Provincial Small Cause Courts Act are mandatory but are sufficiently complied with by satisfying the requirements of the section before the time prescribed for such application in the Limitation Act has elapsed.

It is argued here that this decision is in conflict with a Bench decision of this Court in the case of *Kaghunandan* v. *Badal* (1). This is not correct The judgment in the Bench case of this Court indicates that the applicant was ready to deposit the decretal amount on the day the application was filed but the Court refused to accept it. Such is not the case here, nor were the facts of Civil Revision No. 75 of 1922, decided

(1) 3 O. C. 296.

by the learned Judicial Commissioner similar [*Sita Ram* v. *Lalta* (2)]. In this case the Court specifically granted and fixed a date for the deposit. When the deposit was made by the date fixed it was held by this Court to be sufficient compliance with the provisions of s. 17 of the Provincial Small Cause Courts Act. In the present case no time was fixed and the Court by its order implied that the deposit was to be made as early as possible.

There are no special circumstances in this case and there is no reason why the deposit should be accepted when made after the period of limitation.

I dismiss this application but make no order as to costs.

Z. K. *Application dismissed.*

(2) 73 Ind. Cas. 219; 9 O. & A. L. R. 67; (1924) A. I. R. (O.) 181.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 669 OF 1923.

April 20, 1925.

Present :—Mr. Justice Stuart and Mr. Justice Daniels.

HULASI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Baba NARAIN DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 10, Sch. I, Art. 144—Trust—Alienation by trustee—Suit to recover property improperly alienated—Limitation, commencement of.

Section 10 of the Limitation Act does not apply to a suit against assigns for valuable consideration from a trustee.

Certain trust property including a shop was mortgaged with possession with the defendant. This mortgage was subsequently redeemed by the execution of a sale-deed of certain other property in favour of the defendant. On the same day, however, a fresh usufructuary mortgage of the shop was executed in favour of the defendant. The successor of the trustee who had executed the previous mortgages and sale brought a suit to recover possession of the shop from the defendant on the allegation that the shop had been improperly alienated. The suit was brought more than twelve years from the date of the first mortgage but within twelve years of the date of the second mortgage:

Held, that the suit was within limitation under Art. 144 of Sch. I to the Limitation Act inasmuch as the previous possession of the defendant as mortgagee was put an end to by the sale-deed and limitation for the purposes of this suit began to run from the date of the second mortgage.

Second appeal from a decree of the Additional District Judge, Bareilly, dated the 16th March 1923.

Messrs. *P. L. Banerji* and *S. N. Mukerji*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by a *Mahant* Baba Narain Das, to recover *waqf* property alienated in the time of his predecessor, Baba Bajrang Das. The sole question argued before us is one of limitation. There were a number of different transfers, some made by Bajrang Das himself and some by two persons, Ram Dayal and Gulab, who are said to have been close intimates of Bajrang Das and to have effected certain sales and mortgages of the *waqf* property with his permission. The various transfers that have taken place are all set out in the judgment of the Court below. All of them except one are within twelve years of the date of suit, which was 7th June 1919. The first transfer was a usufructuary mortgage of property including the shop in suit by Ram Dayal and Gulab in favour of Inayat-ullah. Inayat-ullah's successor-in-title was Sewa Ram, and the defendants are the successors-in-title of the latter. On the 26th of June 1907, within twelve years of suit, this mortgage was redeemed by Ram Dayal and Gulab by execution of a sale-deed of property other than the property in suit.

The learned Judge of the Court below has decreed the suit on the ground that s. 10 of the Limitation Act applies, and that there is no period of limitation. The learned Judge cannot have read carefully the section on which he relies, for s. 10 does not apply to a suit against assigns for valuable consideration such as the defendants are. The respondent, however, supports the decree of the Court below on the ground that the suit is within the period of twelve years' limitation under Art. 144, which Article the Privy Council declared to be applicable in such cases by their decision in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1). The appellants contend that they are entitled to date their possession from 19th August 1906. The answer to this contention is that their mortgagee's possession under the deed of 1906 was put an and to by the sale-deed of 26th June 1907. The separate usufructuary mortgage of the same shop executed on 26th

(1) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 29 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

June 1907 is the real starting point for limitation in this case, and that mortgage was executed within twelve years of the suit. We, therefore, uphold the decree of the Court below, though on a different ground, and dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 59 OF 1923.

March 30, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Babu SUMESHAR DATT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KAMTA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of document—Sale-deed—Re-purchase, covenant for—Compliance with terms of covenant.

One of the conditions entered in a sale-deed was that if at the end of a particular year the purchase-money either in one lump sum or by instalments, and the arrears of rent due from the tenants, were paid to the vendee, the property sold shall be returned by the vendee to the vendor, but that the right of return would cease after the expiry of the aforesaid period. Before the expiry of that period the vendor asked the vendee to accept payment of the amount entered in the sale-deed, but the latter refused to do so. Thereafter the vendor gave a notice to the vendee requiring him to state within two days whether he was willing to accept payment under the re-purchase clause. The vendee gave no answer to the notice. Finally, the vendor filed a suit for recovery of the possession of the property on payment of the amount entered in the sale-deed and in the plaint he expressed his willingness to pay the amount mentioned in the sale-deed or any other amount which the Court might adjudge. The suit was instituted before the expiry of the period mentioned in the sale-deed:

Held, that the plaintiff had complied with the condition of re-purchase contained in the sale-deed and was entitled to a decree. [p. 486, col. 1.]

In order to enforce a clause of re-purchase contained in a sale-deed the terms of the clause must be strictly complied with. The conduct of the vendee, however, may amount to a dispensation of a literal compliance with the terms of the clause. [p. 485, col. 2.]

Joy v. *Birch*, (1836) 4 C. & Fin. 57; 10 Bligh. (N. S.) 201; 7 E. R. 22 and *Barrell* v. *Sabine*, (1684) 1 Vern. 268; 23 E. R. 462, referred to.

First appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated the 27th of July 1923.

Messrs. *Niamatullah* and *E. R. Qidwai*, for the Appellants.

Messrs. *M. Wasim* and *Khaliquzzaman*, for the Respondents.

JUDGMENT.—This is the defendants' appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated the 27th July 1923.

The facts are few and simple. The first three plaintiffs and the father of the 4th plaintiff were the owners of village Karanpur, situate in *Pargana* Pachchumrath, in the District of Fyzabad. On the 21st September 1907 these owners conveyed the village by means of a deed of sale to one Babu Baldeo Prasad for a sum of Rs.13,300 (Ex. 1). The vendee was put in possession of the village. Afterwards he sold it to Babu Mahendra Dat Singh and Babu Indra Dat Singh on the 24th September 1915 (Ex. A-1). Babu Mahendra Dat Singh and Babu Indra Dat Singh entered into the possession of the village by virtue of the title arising out of the sale in their favour. They have since died and the defendants to the suit, out of which this appeal arises, are their representatives.

One of the conditions of the deed of sale of the 21st September 1907 was that if at the end of the year 1922 the purchase-money either in one lump sum or by instalments and the arrears of rent due from the tenants were paid to the vendee, the property sold shall be returned by the vendee to the vendors and that the right of return would cease after the expiry of the aforesaid period. The object of the present suit is to obtain the recovery of the village in pursuance of the condition just now mentioned.

Ths learned Additional Subordinate Judge is of opinion that the plaintiffs are entitled to the relief prayed for on the ground that they made sufficient compliance on their part with the condition of the return. In consequence he has given a decree to the plaintiffs for possession of the village Karanpur on payment of Rs. 13,300 within one month from the date of his decree and has also made the plaintiffs liable to pay arrears of rent due by the tenants, if any, till the date of the decree.

At the hearing of the appeal before us, two points were urged on behalf of the appellants as against the decree of the Court below. 1. That the plaintiffs were not entitled to the decree which the Court

below has granted to them without strict compliance with the terms of the conditions of the return and that there was no such compliance. 2. That the plaintiffs were not entitled to a decree for possession of the village in suit but the only relief which could be granted to them would be one of re-conveyance for which relief they did not pray.

In support of the first line of argument we were referred to a large number of decisions of English Courts as to the necessity of strict compliance with conditions entitling a party for a relief of re-purchase in a transaction similar to the one which we have before us. Those cases are fully noticed in Ghose's Law of Mortgage, Volume I, page 88, 5th Edition. From the decision of Lord Chancellor in the case of *Joy* v. *Birch* (1) the following quotation is made at that page:—

"In *Joy* v. *Birch* (1), the Lord Chancellor said: 'It is a well-established rule that under a clause of re-purchase of this description being for the purpose of determining an interest, the terms of the proviso of re-purchase must be strictly complied with. That doctrine was clearly laid down in *Barrel* v. *Sabine* (2) and it was confirmed in a case, in this House, of *Ensworth* v. *Griffiths* (3).' In *Davis* v. *Thomas* (4), Sir John Leach said: 'Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming the privilege must show that the money was paid accordingly.' In *Barrel* v. *Sabine* (2) it was held, 'that where there is a clause or provision in the conveyance for the vendor to re-purchase, the time limited for that purpose ought to be precisely observed.' It was, therefore, necessary for the party claiming the right to re-purchase, strictly to comply with the terms of the provision."

Neither the learned Counsel for the respondents nor do we dispute for a moment the validity of the proposition expressed in the above quotation. The strict compliance upon which the learned Advocate for the appellants insists would be the production by the plaintiff of the sum of Rs 13,300 and the arrears of rent in hard cash before the defendants. To this our reply is that it is equally well-established rule that the conduct of a creditor may amount to a dispensation with the literal compliance of the condition. See the cases cited in para. 1503 of Fisher's Law of Mortgage, 6th Edition.

Now we turn to the circumstances of this case. Chandrika Singh, plaintiff No. 2, deposed on oath that in *Aghan* last (that is about November 1922) he asked the defendant No. 1 to take the money but he refused to accept payment. The defendant No. 1 has not gone into the witness-box to contradict this sworn testimony of Chandrika Singh. We have, therefore, no reason to reject it. Further, we have the admitted fact that the plaintiffs issued a formal written notice to the defendants on the 18th December 1922 asking them to reply in writing within two days, expressing their readiness to accept payment under the deed of sale. The notice further stated that if no such reply was received a suit shall be instituted in the Civil Court for the recovery of the property (Ex. A-8). It is admitted that this notice was received by the defendants and it is further admitted that they gave no reply to it. The defendants have produced their *mukhtar*, Bhagwan Prasad, as a witness in the case. The story which he gives is that after the receipt of the notice he met the plaintiff No. 2 in the compound of the Collector's Court at Fyzabad where he had gone to conduct a case and there he asked the plaintiff to pay him the money mentioned in the notice and the plaintiff said in reply that he had not the money at that time with him. In agreement with the learned Additional Subordinate Judge we are of opinion that the statement of Bhagwan Prasad is wholly incredible and we reject it altogether.

According to the condition in the sale-deed mentioned above, the sum due to the defendants for the arrears of rent was to be ascertained from the accounts given in the detendants' papers. The plaintiffs could have no access to those papers independently of the defendants. The only persons, therefore, who were in a position to communicate the amount of the arrears of rent to the plaintiffs, were the defendants. They did not do so. Finally, this suit, which was instituted on the 22nd December 1922, clearly expressed the plaintiffs' intention to exercise the power

(1) (1836) 4 Cl. & Fin. 57; 10 Bligh (N. S.) 201; 7 E. R. 22.
(2) (1684) 1 Vern. 268; 23 E. R. 462.
(3) (1706) 5 Bro. P. C. 184; 2 E. R. 615.
(4) (1831) 1 Russ. & M. 506; 39 E. R. 195.

of re-purchase on payment of Rs. 13,300 or any other amount which the Court might adjudge. This was, therefore, done within the time allowed by the condition in the deed of sale. In the circumstances the institution of the suit with the offer contained in the plaint was, in our opinion, sufficient compliance with the condition of re-purchase. The defendants in reply to the suit insisted on the fact that the 31st December 1922 had expired before any payment was made by the plaintiffs and that consequently they were not entitled to the relief for which they prayed. This attitude of the defendants amounts to this that nothing was compliance without the defendants hearing the money jingle. Our conclusion, however, is that the plaintiffs offered to pay every thing that was due to the defendants and even money in number would have been produced before them in proper time had they not refused to accept the offer altogether. As a matter of fact, the plaintiffs did comply with the condition of payment laid down by the learned Additional Subordinate Judge in his decree. On these grounds we reject the first point.

As to the second point, it was not taken in the Court below nor it is taken in the memorandum of appeal to this Court. Besides the condition of deed of sale does not state that a deed of re-conveyance shall be executed by the vendee in favour of the vendors. All that it says is that the property shall be returned by the vendee to the vendors.

The result is that we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 55-B OF 1924.

April 9, 1925.

Present:—Mr. Wadegaonkar, Officiating J. C.

RATANSHANI KASBAN—DEFENDANT—APPELLANT

versus

BANNUJI—PLAINTIFF—RESPONDENT.

Practice—Pleadings and proof, variance between, when fatal—Test—Finding based on defendant's admission and his evidence, validity of—Ejectment suit—Finding that defendant's possession is permissive, whether permissible.

Every variance between pleadings and proof is not fatal. The rule that the plaintiff is entitled to succeed upon the allegations made by him in the plaint and pleadings is intended for the protection of the defendant so that he may have notice, from the very commencement, of the case which he has to meet and may not be taken by surprise. This rule has no application where a finding though at variance with the plea of the plaintiff has been arrived at on the admission of the defendant and on the evidence adduced by him. [p. 487, col. 1.]

Plaintiff who was the purchaser of a house sued to recover possession of the house from the defendant on the allegation that the defendant was in possession under a lease granted by plaintiff. The Court found that the lease was not proved but that the defendant's possession which had commenced before the sale in the plaintiff's favour was permissive and not adverse:

Held, that it was open to the Court to decree the plaintiff's suit on that finding. [*ibid.*]

Appeal against the judgment of the Second Additional District Judge, Akola, dated the 10th December 1923, in Civil Appeal No. 108 of 1923.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *G. R. Deo*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to recover possession of a house situated in the town of Basim. It is admitted by both the parties that Chandsha (D. W. No. 4) was the original owner of the house in dispute. It was sold by Chandsha to the plaintiff under a duly registered sale-deed dated 6th March 1908. Plaintiff's case was that she got possession of the house when it was sold to her and continued in possession thereof till 1915, that in 1916, she let it out to the defendant on a monthly rental of Rs. 3 that in August 1922, she gave notice to the defendant to vacate the house and that the defendant failed to do so.

Defendant denied the sale in plaintiff's favour and also plaintiff's possession within 12 years prior to suit. She pleaded that the house in question had been orally gifted to her by Chandsha about 20 years ago and that since the date of gift, she was in adverse possession of the house as owner. She denied the lease set up by the plaintiff and contended that plaintiff's claim was barred by limitation.

Both the Courts below found the sale in plaintiff's favour proved. They, however, found that plaintiff was not in actual physical possession of the property since the date of sale and that the story of the lease in defendant's favour as set up by the plaintiff had not been proved. They, however, held that defendant's possession of the house was permissive and accordingly decreed the claim of the plaintiff.

It is urged in second appeal that the

Courts below were wrong in making out for the plaintiff a case which she did not set up either in the plaint or in her pleadings and in giving her a decree by finding for her that although the defendant was throughout in possession, the said possession was of a permissive character. There is no substance in this contention. Every variance between pleadings and proof is not fatal. The rule that the plaintiff is entitled to succeed upon the allegations made by him in the plaint and pleadings is intended for the protection of the defendant so that he may have notice, from the very commencement, of the case which he has to meet and may not be taken by surprise. This rule has no application where a finding though at variance with the plea of the plaintiff has been arrived at on the admission of the defendant and on the evidence adduced by him. In the present case, the defendant admitted as D. W. No. 1 that Chandsha the original owner of the house in suit had permitted him to occupy the house in suit. To the same effect is the evidence of Chandsha (D. W. No. 4) who deposed that he had given permission to the defendant to occupy the house in suit on condition that she should make annual repairs to the said house. On this evidence the Courts below were fully justified in holding that the truth lay between the pleadings of the parties, *i. e*, that although the defendant did not hold as plaintiff's tenant and was in possession of the house from before the sale in plaintiff's favour, her possession was permissive and not adverse, and that plaintiff's claim was consequently not barred by limitation and liable to be decreed.

In *Loola* v. *Pyare* (1), plaintiff claimed possession of certain land as an ordinary tenant thereof against the defendant as a trespasser. Defendant admitted the tenure of the plaintiff but set up a perpetual lease. The Appellate Court found that the defendant was neither a trespasser nor a perpetual tenant but a licensee and gave the plaintiff a decree for possession on the strength of this finding. It was held by this Court that the procedure adopted by the Appellate Court was not open to any objection. To the same effect is the decision in *Dulichand Chaudhri* v. *Lallahkurmi* (2).

The plaintiff's cause of action in the present suit was that she was the owner of the house in dispute and that the defendant was in wrongful possession of the same. She proved her title to the house and although she failed to prove that the defendant had held the house as her tenant, the Courts below found that the possession of the defendant which commenced prior to the sale in plaintiff's favour was permissive and that defendant had failed to prove that it became adverse. On these findings, the Courts below were perfectly justified in decreeing plaintiff's claim. The decree appealed against is correct and I dismiss this appeal with costs. Costs in the Courts below will be paid as ordered by the Appellate Court.

G. R. D. *Appeal dismissed.*

Z. K.

(1) 33 Ind. Cas. 497; 12 N. L. R. 57 at p. 60.
(2) 1 N. L. R. 4.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 510 OF 1924.
April 21, 1925.

Present:—Mr. Ashworth, A. J. C.

MATADEEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHUNATH PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 6, 7—Defendant filing written statement but withdrawing from case—Non-appearance—Ex parte *proceedings—Application to set aside* ex parte *proceedings—Sufficient cause for withdrawal, proof of.*

A defendant who appears and files a written statement and then withdraws can be in no better position than a party who makes no appearance at all. In such a case the Court is entitled to proceed *ex parte* against the defendant. If at the next hearing of the case the defendant applies that the order for *ex parte* proceedings should be set aside, he must show good cause for his previous withdrawal from the suit, the withdrawal being equivalent to "non-appearance," within the meaning of r. 7 of O. IX of the C. P. C.

The fact that a defendant cannot engage Counsel and is himself unable to conduct the defence, is insufficient to justify his withdrawal from the case.

Second appeal against a decree of the Sub-Judge, Rai Bareli, dated the 8th September 1924, affirming that of the Munsif, Rai Bareli, dated the 7th August 1923.

Mr. *G. P. Shukla*, for the Appellants.

JUDGMENT.—This second appeal arises out of a suit brought by the respondents-plaintiffs for possession of certain land. On the day fixed for the appearance of the parties the defendant-appellant as well as

the plaintiffs appeared in Court, but the defendant-appellant after filing his written statement withdrew from the case because he said that he could not afford Counsel and was unable to defend the case himself. The Court, therefore, directed that the suit should proceed *ex parte*. The 6th August was fixed for the production of the plaintiff's evidence. On that date the defendant appeared and asked that the order directing that proceedings should proceed *ex parte* should be set aside and that he might be allowed to produce his evidence. The Munsif rejected his application, and after considering the plaintiff's evidence, passed a decree against the defendants-appellants *ex parte*. From this decree the defendant-appellant appealed to the Subordinate Judge. The Subordinate Judge held that the record failed to disclose any illegality, and on the strength of the ruling in *Jadu Nath Basak* v. *Ram Narayan* (1) held that in appeal he could not go outside the record and consider the appeal as if it were an application under O. IX, r. 13 for setting aside an *ex parte* decree. In this the lower Appellate Court was undoubtedly right. The sole question that arises in this case is whether

1. The Court of first hearing was justified in the circumstances, when the defendant withdrew from the proceedings, in directing that proceedings should be *ex parte* against him.

2. Whether the Court of first hearing was justified in rejecting the application of the appellant dated 6th August for the setting aside of the order of the 22nd May that proceedings should be *ex parte*, and in refusing to allow the defendant to produce his evidence and resist the case?

As to question No. 1, it is urged by the appellant's Counsel that there is no provision of the C. P. C. exactly applicable to the case. It is clear, however, that a party who appears and then withdraws can be in no better position than a party who makes no appearance at all. The Court of first hearing was clearly entitled to adopt and direct that the case should proceed *ex parte*. As to the second point, under O. IX, r. 7, it was necessary for the defendant to show good cause for his previous withdrawal from the suit, withdrawal being equivalent to "non-appearance" as used in that rule. In the application the reason given for the withdrawal was that he had not got Counsel, and that he could not conduct the defence himself. These reasons were obviously insufficient to justify his withdrawal. It is true that the Court of first hearing might have allowed the appellant to be heard on the 6th August as a matter merely of clemency, but the Court was undoubtedly right in refusing to allow him to be heard, as it is clear that it would have meant a further adjournment of the case in order to enable the defendant to produce his evidence.

The application of the 6th August does not state that the appellant could proceed with the case straight-away. The application is silent on the point. The appeal is, therefore, dismissed under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

(1) 1 Ind. Cas. 329; 12 O. C. 25.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 161 OF 1924.

May 20, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

NET SINGH AND OTHERS—APPLICANTS

versus

THE RECEIVER OF THE ESTATE OF GAJRAJ SINGH AND ANOTHER—OPPOSITE PARTY.

Provincial Insolvency Act (V of 1920), s. 28 (5)—Bundelkhand Alienation of Land Act (III of 1903), s. 16—Land belonging to agriculturist, whether exempt from attachment and sale—Insolvency—Land, whether vests in Official Receiver.

Land belonging to a member of an agricultural tribe which is protected from sale in execution of a decree by the provisions of s. 16 of the Bundelkhand Alienation of Land Act falls within the purview of sub-s. (5) of s. 28 of the Provincial Insolvency Act and does not vest in the Official Receiver on the insolvency of the proprietor. [p. 489, col. 1.]

Detar Kaur v. *Ram Pattan*, 58 Ind. Cas. 603; 1 L. 192; 2 L. L. J. 333, *Nagindas Bhukhandas* v. *Ghelabhai Gulabdas*, 56 Ind. Cas 450; 44 B. 673; 22 Bom. L. R. 322 and *Sagar Mal* v. *Girraj Singh*, 38 Ind. Cas. 171; 39 A. 120; 14 A. L. J. 1031, distinguished.

Mauji v. *Girdhari Lal*, 61 Ind. Cas. 664; 2 L. 78, dissented from.

Kalka Das. v. *Gajju Singh*, 62 Ind. Cas. 897; 43 A. 510; 19 A. L. J, 439; 3 U. P. L. R. (A.) 73, referred to.

First appeal from an order of the District Judge, Jhansi, dated the 31st of May 1924.

St. *C. Thompson*, for the Appellants.

JUDGMENT.

Daniels, J. — This is an appeal

against an order of the District Judge of Jhansi refusing to set aside two alienations made by the insolvent after adjudication on the ground that this particular property does not vest in the Receiver. The learned District Judge's order is so brief as to hardly amount to a judgment at all. He does not specify the nature of the property or give any reasons why it does not vest. He merely refers to a previous order of his which was passed on an application to prosecute the insolvent under s. 69 and which has no bearing on this question. From other papers on the record, however, it appears that the property is property to which the provisions of the Bundelkhand Alienation of Land Act of 1903 apply. The appellant before us is the principal creditor of the insolvent. The learned District Judge relied on s. 16 of the Bundelkhand Alienation of Land Act which says that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree made after the commencement of this Act. Sub-section (5) of s 28 of the Provincial Insolvency Act provides that the property vesting in the Receiver shall not include any property which is exempted by any enactment for the time being in force from liability to attachment and sale in execution of a decree. The appellant relies on two decisions of the Punjab High Court [*Datar Kaur* v. *Ram Rattan* (1) and *Mauji* v. *Girdhari Lal* (2).] In the latter of these cases the learned Judges held that notwithstanding a similar provision in the Punjab Alienation of Land Act property of this kind did vest in the Receiver. With all respect we are unable to follow the reasoning of this judgment. If we ask the question, could this property have been attached and sold in execution of a Civil Court decree? The answer in view of s. 16 of the Bundelkhand Alienation of Land Act must be 'No.' It follows, therefore, that this is property which is exempted from attachment and sale within the meaning of s. 28 of the Provincial Insolvency Act. We are, therefore, unable to accept this appeal which we accordingly dismiss. We make no order as to costs as the respondent is not represented.

Sulaiman, J.—I agree and would only like to add a few words with regard to the rulings that have been cited. The case of *Nagindas Bhukhandas* v. *Ghelabhai Gulabdas* (3) is not directly in point because in that case the question turned on the express provisions of s. 4 of the Provident Funds Act (IX of 1897) which make the deposit not liable to attachment and say that the Receiver will neither be entitled to it nor have any claim on it. Similarly the case of *Sagar Mal* v. *Girraj Singh* (4) may be said to be not directly in point because there the question was whether the occupancy holding vested in the Receiver. The decision turned to some extent on the provisions of the Agra Tenancy Act. That case, however is helpful to this extent that even under the provisions of the Agra Tenancy Act there is no express prohibition against attachment and all that s. 20 says is that the tenancy is not transferable in execution of a decree of the Civil or Revenue Court. In the same way the Full Bench case of *Kalka Das* v. *Gajju Singh* (5) may be helpful.

The case of *Datar Kaur* v. *Ram Rattan* (1) is also distinguishable because there the learned Judges of the Lahore High Court came to the conclusion that under s. 72, C. P. C., a Civil Court has power to make a temporary alienation of the property.

It is unnecessary to express any opinion as to whether a Civil Court can order the Collector to take steps as provided in the section or whether it can only authorise him if he himself represents to the Court. It is quite sufficient to say that in these Provinces a Notification under s. 68, C. P. C., has actually been issued, which apparently is not the case in the Punjab, and that, therefore, s. 72 is wholly inapplicable here.

The case of *Mauji* v. *Girdhari Lal* (2) is certainly in point, because the corresponding sections of the Bundelkhand Alienation of Land Act III of 1903 and the Punjab Alienation of Land Act are identical in language. The learned Judges of Lahore have held that there is a difference between the expression 'attachment and sale' and the expression 'attachment or sale,' and that inasmuch as there is no prohibition against attachment of properties, the case does not fall within s. 28 of the Insolvency Act.

In the first place, I would like to point

(1) 53 Ind. Cas. 603; 1 L. 192; 2 L. L. J. 333.
(2) 61 Ind. Cas. 664; 2 L. 78.
(3) 56 Ind. Cas. 450; 44 B. 673; 22 Bom. L. R. 322.
(4) 38 Ind. Cas. 171; 39 A. 120; 14 A. L. J. 1031.
(5) 62 Ind. Cas. 897; 43 A. 510; 19 A. L. J. 439; 3 U. P. L. R. (A.) 73.

out that the conjunction 'and' is not always used in its cumulative sense. The words that it joins need not always be taken together but may also be taken individually; for example the sentence 'sales and gifts of occupancy holdings are prohibited' does not mean that sale and gifts are to be taken together, but it means either of them individually. The sentence is a perfect equivalent of 'sales or gifts, etc., are prohibited.'

If the expression 'attachment and sale' is to be given an altogether different meaning from the expression 'attachment or sale' then there may be some difficulty in applying that portion of s. 28, sub-cl. (5) of the Insolvency Act which mentions property exempted by the C. P. C. from liability to 'attachment and sale,' for the proviso to s. 60 of the Code speaks of 'attachment or sale.'

With great respect to the learned Judges of the Lahore High Court I would say that the learned Judges in their anxiety to avoid giving to the word 'and' the meaning of the word 'or' have attached to it the meaning which an expression like 'and also' or 'as well as' would have. Their interpretation of the section is that only property which is exempted from liability to attachment *and also* exempted from liability to sale does not vest in the Receiver. With great deference I would say that the fallacy consists in supposing that the expression 'exempted from' governs the two words 'attachment' and 'sale' whereas it really governs only one word 'liability.' There is, therefore, no justification for splitting up the clause as if it read 'exempted from liability to attachment and also exempted from liability to sale.'

The position is in no way improved by considering that the words 'attachment and sale' are indissolubly connected together. If this be so then they together indicate the continued process of attachment followed by sale, that is sale with attachment as distinguished from sale without attachment. Surely if a process consists of two steps and either of those steps is missing the complete process itself is absent. Property which cannot be attached (though sold) or which cannot be sold (though attached) cannot obviously be 'attached *and* sold.' The Bundlekhand property is admittedly not liable to be sold in execution. If one condition is not fulfilled it is obvious that both the conditions taken together cannot be said to be fulfilled. If a property is not liable to be sold it is certainly not liable to be attached and sold. If liability to "attachment and sale' is a narrower expression than 'liability to attachment *or* sale' then the negative expression ' non-liability to attachment *and* sale' assumes a wider scope than the negative 'non-liability to attachment or sale,' and all properties within this wider compass would be exempted from vesting in the Receiver.

The matter becomes abundantly clear if we ask ourselves the question "Is this property 'liable to attachment *and* sale"? The answer cannot possibly be in the affirmative. It must be in the negative, and if the answer is 'No,' the property is exempted from liability to 'attachment and sale' and therefore, does not vest in the Receiver at all.

The policy of the Legislature obviously seems to be that properties which cannot be attached and sold do not vest in the Receiver. There is no injustice in this for when creditors cannot recover their debts by sale of the properties, they suffer very little if their representative, the Receiver, cannot realise the debts out of such properties. The same protection seems to have been intended for members of the agricultural tribes in Bundlekhand as extends to tenants of non-transferable tenancies in the Agra Province. In neither case the property is saleable in execution of any decree. It is, therefore, not available for the creditors and, therefore, it does not vest in the Receiver. This view finds support from s. 17 (*a*) of the Bundhelkhand Land Alienation Act under which provision is made for the realization of decrees for arrears of revenue and arrears of profits, and not for Civil Court's decrees.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 151 OF 1924.

April 29, 1925.

Present :— Mr. Wadegaonkar, A. J. C.

THE FIRM OF SHEONATH-JAINARAYAN —PLAINTIFF—APPLICANT

versus

THE G. I. P. RAILWAY Co., LTD.— DEFENDANT—NON-APPLICANT.

Railways Act (IX of 1890), s. 77—Notice—Amount

of compensation claimed not mentioned, effect of—Suit for compensation for damage to goods—Ownership of plaintiff not disputed—Railway receipt not endorsed in plaintiff's favour, effect of.

Section 77 of the Railways Act merely requires that a demand for compensation must be made and does not enact that the money value of the claim must be stated in the notice of demand. A notice under the section is not, therefore, vitiated owing to the omission to mention the amount of compensation claimed.

Durga Prasad v. *G. I. P. Railway*, 74 Ind. Cas. 993; 3 Pat. 76 at p. 79; (1923) Pat. 284; 5 P. L. T. 42; (1924) A. I. R. (Pat.) 98, followed.

In the absence of any contention that a person who claims compensation for damage caused to a consignment owing to the negligence of the defendant Railway Company, is not the owner of the goods consigned, the suit cannot be dismissed merely on the ground that the Railway receipt has not been endorsed in his favour by the consignor who had consigned the goods for being delivered to self.

Revision against the judgment of the Small Cause Court, Khandwa, dated the 12th February 1924, in Civil Suit No. 2141 of 1923.

Mr. *J. Sen*, for the Applicant.

Mr. *K. K. Gandhe*, for the Non-Applicant.

ORDER.—On 7th December 1922, 32 bags of grain were consigned to the defendant Company at Gadarwara by one Deoraj Khemji for being delivered to self at Khandwa. They were booked at Railway risk. They reached Khandwa on 12th December 1922. Plaintiff alleged that they were damaged by rain owing to the negligence of the defendant Company and that he consequently refused to take delivery thereof. He, therefore, brought a suit against the defendant Company in the Small Cause Court, Khandwa for recovery of Rs. 328-8-0 as damages plus interest thereon at Re. 1 per cent. per mensem. That Court dismissed his claim on the following three grounds:

(1) In the notice given by the plaintiff to the agent of the defendant Company, the amount claimed by way of compensation was not mentioned and that the notice was consequently bad in law.

(2) Plaintiff was neither the consignor nor the consignee of the goods and that he had consequently no right to maintain the suit.

(3) No damage was done to the goods by rain as alleged by the plaintiff and that plaintiff was not justified in refusing to take delivery of the goods.

Plaintiff has now come up in revision. He contends that the lower Court was wrong in holding that the notice given by him to the defendant Company was bad in law merely because it omitted to mention the amount of compensation. This contention must prevail. Section 77 of the Indian Railways Act mere requires that a demand for compensation must be made and does not enact that the money value of the claim must be stated in the notice of demand : *Durga Prasad* v. *G. I. P. Railway* (1).

It is next urged that the lower Court was wrong in holding that the plaintiff had no right of suit because the Railway receipt had not been endorsed in his favour by the consignee. I think this contention must also prevail. It is not the case of the defendant Company that plaintiff is not the owner of the goods and was not entitled to obtain delivery thereof. On the contrary it is perfectly clear from the allegations made in the written statement that the defendant Company throughout admitted that the plaintiff was the owner of the consignment. The Company says that delivery of the goods was offered to the plaintiff and that he wrongfully refused to take delivery though the goods were not damaged. In para. 7 of the written statement it is stated: "The survey was made in the presence of *the consignee the plaintiff*." In the face of these pleadings, the lower Court was wrong in holding that the plaintiff was not entitled to sue.

It is next urged that the lower Court wrongly found that the defendant Company was not guilty of negligence and that the consignment was not damaged. This, however, is a finding of fact and is amply supported by very satisfactory evidence and cannot be challenged in revision. In view of this finding, the lower Court was right in dismissing plaintiff's claim.

It, however, appears that the consignment was sold by the defendant Company by public auction for Rs. 210 on 2nd April 1923 after plaintiff refused to accept delivery of the bags and the Company offered to pay Rs. 82-2 out of this sum to the plaintiff after deducting Rs. 127-14 0 on account of freight and wharfage. This sum was not accepted by the plaintiff and is still lying in the hands of the defendant Company. Plaintiff is entitled to a decree for this sum.

The decree of the lower Court is set aside and it is hereby decreed that defendant do pay Rs. 82-2-0 to plaintiff. Plaintiff must

(1) 74 Ind. Cas. 993; 3 Pat. 76 at p. 79; (1923) Pat. 284; 5 P. L. T. 42; (1624) A. I. R. (Pat.) 98.

however, bear defendant's costs of both Courts in addition to his own.

G. R. D. *Decree set aside.*
Z. K.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1428 OF 1924.

May 22, 1925.

Present:—Mr. Justice Boys and Mr. Justice Banerji.

JAGANNATH PRASAD AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

JUGUL KISHORE AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Hindu Law—Joint family—Debt incurred by father—Liability of sons—Immoral debt—Obligation arising out of misappropriation—Test.

Where property belonging to a Hindu son is sought to be attached and sold in execution of a decree obtained against the father in respect of money which the father is alleged to have misappropriated, and it is contended that the property is not liable to attachment and sale inasmuch as the debt in respect of which the decree was obtained was tainted with immorality, the test to be applied is whether or not the action of the father which resulted in the debt was infected with an element of criminality. Whether such an element is established or not and the degree of infection which will support a plea of immorality is a question for determination on the facts of each case; and though a conviction of the father for misappropriation or other cognate offence may be good proof of such element, proof of a previous conviction is not essential for this purpose. The criminality and its degree may be inferred from consideration of all the facts of the case. [p. 492, col. 2.]

Mahabir Prasad v. *Basdeo Singh*, 6 A. 234; A. W. N. (1884) 47; 3 Ind. Dec. (N. S.) 852, *Niddha Lal* v. *Collector of Bulandshahr*, 35 Ind. Cas. 209; 14 A. L. J. 610 and *Sabhaddi Lal* v. *Gobind Singh*, 80 Ind. Cas. 579; 46 A. 616; 22 A. L. J. 470; (1924) A. I. R. (A.) 472; L. R. 5 A. 364 Civ., followed.

Execution second appeal from a decree of the District Judge, Badaun, dated the 16th August 1924.

Messrs. *Sankar Saran* and *Baleshwari Prasad*, for the Appellants.

Mr. *S. A. Haider*, for the Respondents.

JUDGMENT.—This appeal has been described to us at the opening of the arguments as a decree-holder's appeal, but, as a matter of fact, it is hardly in his capacity as a decree-holder that the appellant initiated these proceedings at all. The case has occupied a very long time in argument as certain facts were not brought to our attention until the extreme end of the hearing. It may really be decided briefly.

The appellant before us appeals from an order of the lower Appellate Court upholding an order of the First Court dismissing his application under O. XL, r. 4, C. P. C., The appellant had been a party to some criminal and civil litigation in the course of which certain moveable property which was in dispute had been entrusted, apparently in a more or less irregular manner, to one Shib Charan Lal whom we may for the purposes of this case only, describe as a Receiver. He had apparently occupied some such position in the criminal litigation under Ch. XII of the Cr. P. C., and irregularly succeeded to some sort of a similar position in the civil litigation. The civil litigation was a suit for partition and at the end of it the present appellant believed that the Receiver had misappropriated some of his property and he was unable to extract it. For our present purposes his earlier efforts need not be mentioned; but on the 27th of August 1923 he applied for attachment and sale of the property of the sons of Shib Charan Lal. The defences, as is generally the case in such proceedings, were various but one of the defences was that the property in the hands of the sons was not liable for the debt of the father, that debt having its origin in "embezzlement". Both Courts have dismissed his application finding that there had been "misappropriation" on the part of the father. We have been referred to many cases as to what constitutes "immorality" of a debt so as to enable the sons to escape liability therefor. We think that the test to be applied in a case of the kind now before us is whether or not the action of the father which resulted in the debt was infected with an element of criminality Whether such an element is established or not and the degree of infection which will support a plea of "immorality" must be a question for determination on the facts of each case; and though a conviction for misappropriation or other cognate offence may be good proof of such element, proof of a previous conviction is certainly not essential. The criminality and its degree may be inferred from a consideration of the whole facts If there was such an element it has been regarded, at any rate, by this Court as an immoral debt; otherwise, if there was no such criminal element. For the former proposition we may refer to the case of *Mahabir Prasad* v. *Basdeo*

Singh (1) and for the latter to the decisions reported as (*Niddha Lal* v. *Collector of Bulandshahr* (2), and *Sabhaddi Lal* v. *Gobind Singh* (3). Of the many cases we have considered of other Courts, none appears to be in conflict, at any rate, with this principle.

In the present case both the lower Courts have found that the father "misappropriated" and we were for some time in doubt in view of the language used in some cases as to whether we should regard this as a finding of criminal misappropriation or as one which possibly indicated no more than civil liability. Any doubt, that we might have had, has, however, effectively been removed by our being referred to para. 9 of the application of the present appellant which initiated the present stage of these proceedings on the 24th of January 1922, paper No. 888 C). That was his application under O. XL, r. 4, C. P. C. In that paragraph he himself relied on the fact that the father Shib Charan Lal had been prosecuted (apparently at the instance of the appellant) for criminal breach of trust and complained that Shib Charan Lal had been acquitted owing to an improper interference with the Criminal Court by the Civil Court. In view of these allegations it is impossible to allow the appellant now to urge that the finding against him that the father misappropriated property is not a finding that he misappropriated that property criminally. This to our minds is sufficient to conclude the appellant's rights in this appeal. The finding as we interpret it in the light of the appellants own interpretation is that the respondent's father had incurred this debt by committing criminal misappropriation. That brings the case within the principle of *Mahabir Prasad* v. *Basdeo Singh* (1) and this appeal must fail. It is accordingly dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 6 A. 234; A. W. N. (1884) 47; 3 Ind. Dec. (N. S.) 852.

(2) 35 Ind. Cas. 209; 14 A. L. J. 610.

(3) 80 Ind. Cas. 579; 46 A. 616; 22 A. L. J. 470; (1924) A. I. R. (A.) 472; L. R. 5 A. 364 Civ.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1134 OF 1922.

April 18, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

THE OFFICIAL RECEIVER OF THE ESTATE OF MESSRS. MOHANDAS CHETANDAS—PLAINTIFFS

versus

NARAINDAS-LOTARAM AND OTHERS—DEFENDANTS.

Insolvency—Firm, whether distinct person—Partners, position of—Partnership accounts, right to sue for, whether property—Official Receiver, whether can sue for accounts—Cause of action, meaning of—Assignment, whether part of cause of action—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 20 (c).

A firm is not a separate and distinct person. A firm name is merely recognized as a convenient symbol or shorthand form for collectively designating all the partners in the firm, and, therefore, an order of adjudication passed against a firm is in effect an order against the individual partners in that firm. [p. 494, cols. 1 & 2.]

In re Sawers, (1879) 12 Ch. D. 522 at p. 523; 41 L. T. 46; 28 W. R. 334, *Sadler* v. *Whiteman*, (1910) 1 K. B. 868; 102 L. T. 472; 26 T. L. R. 372; 54 S. J. 375, *In re Vagliano Anthracite Collieries*, (1910) 79 L. J. Ch. 769; 103 L. J. 211; 54 S. J. 720, *Rex* v. *Holden*, (1912) 1 K. B 483; 81 L. J. K. B. 327; 106 L. T. 305; 76 J. P. 143; 22 Cox C. C. 727; 56 S. J. 188; 28 T. L. R. 173 and *Seodoyal Khemka* v. *Joharmull Manmull*, 75 Ind. Cas. 81; 50 C. 549 at p. 558; (1924) A. I. R. (C.) 74, relied upon.

A right to sue for partnership accounts is property which vests in the Official Receiver. [p. 494, col. 2.]

Vishindas Nihalchand v. *Thawerdas*, 80 Ind. Cas. 642; 17 S. L. R. 334; (1925) A. I. R. (S.) 18, referred to.

A "cause of action" includes every fact necessary to be proved in order to enable the plaintiff to sustain his action and every thing which, if not proved, gives the defendant an immediate right to judgment. [*ibid.*]

An assignment of a claim whether voluntary or by virtue of adjudication of the person in whom that claim resides, is a part of the cause of action in a suit in respect of that claim, which gives jurisdiction to the Court within whose limits the said assignment took place to entertain the suit. [p. 495, col. 1.]

Read v. *Brown*, (1889) 22 Q. B. D. 128; 58 L. J. Q B. 120; 60 L. T. 250; 37 W. R. 131, *Coburn* v. *Colledge*, (1897) 1 Q. B. 702 at p. 707; 66 L. J. Q. B. 462; 76 L. T. 608; 45 W. R. 488, *Raghoonath Misser* v. *Gobindnarain*, 22 C. 451; 11 Ind. Dec. (N. S.) 301 and *Manepalli Mangamma* v. *Manepalli Sathiraju*, 37 Ind. Cas. 681; 31 M. L. J. 816; 5 L. W. 246, relied upon.

Mr. *Srikishendas H. Lulla*, for the Plaintiffs.

Mr. *Kewalram Jethanand*, for the Defendants.

JUDGMENT.—This is a suit for settlement of partnership accounts. It appears that one Chatandas and his sons Dharamdas and Naraindas carried on business in the name of Mohandas-Chatandas. They

entered into a sub-partnership with the present defendants for carrying on some particular kind of business in the Persian Gulf and certain other place outside British india. Chatandas and his sons have been adjudicated insolvents by this Court in Insolvency Application No. 18 of 1921, and their property has vested in the Official Receiver of this Court. The present suit is filed by the Official Receiver for settlement of the accounts of the sub-partnership. Several technical pleas have been raised which are summed up in the following issues:—

1. Has the Official Receiver a right to sue?

2. Has this Court jurisdiction to try the suit?

3. Were Chatandas and his two sons carrying on business at Shikarpur in the name of Mohandas-Chatandas?

4. What were the terms of the partnership agreement?

5. Was it a term of the agreement as alleged in para. 9 of the written statement? If so, should the account relating to Bunder Abbas appearing in the books of Mohandas-Chatandas be settled in this suit?

6. Are defendants bound by any claims proved before the Official Receiver?.

7. When did the partnership terminate?

8. On accounts being taken what is due and to whom?

9. General.

Issue No. 1.—This issue is based on a two-fold objection. It is contended, firstly, that the firm of Mohandas-Chatandas and not Chatandas and his sons have been adjudicated insolvent that the Official Receiver has instituted this suit as representing the estate of the insolvent firm, but so far as the sub-partnership in suit was concerned, it was formed between the individuals Chatandas and his sons and the defendants and secondly, that the subject-matter of the suit which is one for taking partnership accounts is not property which can vest in the Official Receiver, and, therefore, the Official Receiver cannot sue. There is no substance in either of these objections. A firm is not a separate and distinct person according to our law. In *In re Sawers* (1), *Sadler* v. *Whiteman* (2), *In re Vagliano Anthracite Collieries* (3), *Rex* v. *Holdin* (4) and *Seodoyal Khemka* v. *Joharmull Manmull* (5). A firm name is merely recognized as a convenient symbol or shorthand form for collectively designating all the partners in the firm just as one may use A or B in algebraical computations to designate known quantities which would be inconvenient to specify at length. Underhill on the Law of Partnership, page 47. An order of adjudication passed against the firm of Mohandas-Chatandas, even if such be the nature of the order, is in effect an order against the individual partners in that firm, and the present suit though it purports to be instituted by the Official Receiver as representing the estate of the firm of Mohandas-Chatandas, is a suit by him as representing the estate of the individual partners. As held by me in the Bench ruling of *Vishindas Nihalchand* v. *Thawerdas* (6), the subject-matter of the present suit is property that has vested in the Official Receiver. My finding, therefore, on Issue No. 1 is in the affirmative.

Issue No. 2.—One of the grounds on which it is said that this Court has jurisdiction is that the order of adjudication vesting the property of the insolvents in this Official Receiver was passed by this Court, and in order to enable the plaintiff to succeed in this suit, he has *inter alia* to plead and to prove if traversed a part of his cause of action the vesting of the insolvents' property in him.

A "cause of action" is defined in the case of *Read* v. *Brown* (7), by Lord Esher, M. R., as "including every fact necessary to be proved in order to enable the plaintiff to sustain his action", and by Fry, L. J., as "everything which, if not proved, gives the defendant an immediate right to judgment".

It would appear from this case that under s. 12 of the Mayor's Court of London Procedure Act, 1857 (20 and 21 Vict. C. CLVII) the Mayor's Court had jurisdiction to entertain certain monetary suits where the cause of

(1) (1879) 12 Ch. D. 522 at p. 523; 41 L. T. 46; 28 W. R. 334.

(2) (1910) 1 K B. 868; 102 L. T. 472; 26 T. L. R. 372; 54 S. J. 375.

(3) (1910) 79 L. J. Ch. 769; 103 L. T. 211; 54 S. J. 320.

(4) (1912) 1 K. B. 483; 81 L. J. K. B. 327; 106 L. T. 305; 76 J. P. 143; 22 Cox. C. C. 727; 56 S. J. 188; 28 T. L. R. 173.

(5) 75 Ind. Cas. 81; 50 C. 549 at p. 558; (1924) A. I R. (C.) 74.

(6) 80 Ind. Cas. 642; 17 S. L. R. 334; (1925) A. I. R. (S.) 19.

(7) (1889) 22 Q. B. D. 128; 58 L. J. Q. B 120; 60 L. T. 250: 37 W. R. 131.

action or a part of the cause of action had arisen within the jurisdiction of that Court, and this suit was instituted in the Mayors Court by the assignee of a debt on the sole ground that the assignment which formed a part of his cause of action was made within the jurisdiction of that Court. It may seem somewhat anomalous that though a creditor may not himself file a suit in a particular Court, he may, by voluntarily assigning the claim to a stranger within the jurisdiction of that Court enable the assignee to sue in that Court. This anomaly was pressed on their Lordships but to no effect.

This comprehensive definition of a "cause of action" was re-affirmed by Lord Esher, M. R, in *Coburn* v. *Colledge* (8). This definition has been adopted and acted upon by almost all the High Courts in India in different kinds of suits. It would be sufficient here to refer to the cases of *Raghoonath Misser* v. *Gobind Narain* (9) and *Manepalli Mangamma* v. *Manepalli Sathiraju* (10) which are instances of voluntary assignments. In Suit No. 57 of 1922, Kemp Additional Judicial Commissioner who had considerable experience of the procedure adopted by the Official Assignee at Bombay for recovery of debts of insolvents adjudicated under the old Bankruptcy Act and its successor the Presidency Towns Insolvency Act, held that this Court had jurisdiction to entertain a suit filed by the Official Receiver of this Court to recover a debt due to an insolvent adjudicated as such by this Court under the Provincial Insolvency Act and observed as follows:—

"I think on the authority of *Read* v. *Brown* (7), this Court has jurisdiction to try the suit against the first defendant. A similar case is, *e. g.*, where the Official Assignee in Bombay files suits there on debts due by up-country debtors to the insolvents. In these cases the assignment to the Official Assignee is by vesting order".

Possibly there is some distinction between the case of a voluntary assignment of a debt which is absolute and where the assignee sues in his own name and for his own benefit, and the case of a mere vesting of property in an Official Assignee or Receiver for the benefit of others. But the Official Assignee or Receiver like any other assignee must aver as a necessary part of his cause of action the fact of the vesting in him of property which is the subject-matter of the suit and though oftentimes this averment is not traversed, he must, if it be traversed, prove it. As a matter of fact, in the present case the defendants have traversed the right of the Official Receiver to sue.

Though I am aware of the hardship entailed upon up-country defendants in being required to contest their suits in this Court, as at present advised, I am not prepared to differ from the view taken by Kemp, A. J. C., or to hold that the averment as to the vesting of property in the Official Receiver is not an essential part of the cause of action of the Official Receiver.

Under the circumstances, it is not necessary for me to go into the further question that a part of the partnership business was transacted here. I hold on issue No. 2 in the affirmative.

Issue No. 3.—This issue has been given up and my finding, therefore, is in the affirmative.

Issue No. 4.—The original partnership deed has been produced. The defendants admit having executed. My finding, therefore, will be that the terms of the partnership are those stated in document Ex. 7, and the paragraph of this document describing the shares of the partners is as follows:—

Rs.	a.	p.	
0	0	6	in words half anna will be received by you, the Puj Shahs on account of *dharmau* out of the profit. Besides Rs. 2-8-0 in words rupees two annas eight per cent. will be deducted first by you, the Puj Shahs, out of the profit on account of making distribution, and then the distribution will be made. After the distribution, you, the Puj Shahs, will give to each partner as much as you wish by way of '*pehriani*.'
1	1	0	agreed to be paid by Puj Shahs, Puj Mohandas, Puj Chatandas, Puj Dharamdas, Puj Naraindas, Talreja Punjabi, for investing the capital.

(8) (1897) 1 Q. B. 702 at p. 707; 66 L. J. Q. B. 462; 76 L. T. 608; 45 W. R. 488.
(9) 22 C. 451; 11 Ind. Dec. (N. S.) 301.
(10) 37 Ind. Cas. 681; 31 M. L. J. 816; 5 L. W. 246.

Rs.	a.	p.	
1	0	0	in words sixteen annas to the ten partners for working at and carrying on business of the three shops at Bunder Abbas, Kerman and Burmabad. The partners will make this one rupee into Rs. 1-9-8 in words rupee one annas nine and pies eight, and shall distribute the same amongst themselves as under.
0	9	10	for the shop of Bunder Abbas nine annas and ten pies will be received by the partners who work at this shop as under:—
0	6	3	Narain Puj Lotaramani Chawla, in words annas six and pies three.
0	2	0	in words annas two of Bhai Bholaram Bhai-Dholaramani Wadhwa.
0	1	2	in words one anna and two pies of Bhai Jamnadas-Bhai Cellaramani Gind.
0	0	5	in words pies five of Bhai Pokardas Shewaramani Chawla.
0	9	10	
0	8	1	in words annas eight and pie one for partners of the shop at Kerman.
0	5	4	in words five annas four pies of Bhai Bodaram-Bhai Deoomalani Khatri.
0	2	0	in words two annas of Bhai Hotchand-Bhai Hoanamalani Babu.
0	0	10	in words ten pies of Bhai Gopamal Bhanemalani Narelo.
0	8	1	(*sic.*) Total.
0	7	8	in words annas seven and pies eight of the partners of Burmaabad.
0	5	4	in words annas five and pies four of Bhai Jivandas-Bhai Tanumalani Makhija.
0	1	7	in words anna one and pies seven of Bhai Sewaram-Bhai Khiaramalani Chhabra.
0	0	9	in words pies nine of Tikammal Bhai-Sangatmalani Dhingra.
0	7	8	Total.

Rs.	a.	p.	
1	9	8	total, in words rupee one annas nine and pies eight have in this way been made out of rupee one being the share of the partners, which they will share as above amongst themselves.
2	1	6	total, in words rupees two annas one and pies six of the profit will be distributed with Puj Shahs of Shikarpur as above.

Besides this whoever goes as a "*munim*" at the shops and works there shall receive board-lodging, clothing and other expenses free according to usage, and a cook on salary will be engaged for each shop whose salary will be charged to the "*vato*" account of the business."

Issue No. 5.—The parties are now agreed that the Bunder Abbas Vast *khata* in the Shikarpur books of the insolvents is a partnership account *khata* and is subject-matter of the present suit, *vide* my note dated April 8, 1925. My finding, therefore, on the second part of this issue is in the affirmative. The first part of this issue has not been pressed, and my finding, therefore, on it is that whether there is a profit or loss on this account, all parties are equally entitled and liable as the case may be according to their respective shares.

Issue No. 6.—The defendants are of course not bound by any proof of claims accepted by the Official Receiver for purposes of insolvency. If the defendants dispute any of those claims, they must file their objections within fifteen days of this date or such further time the Commissioner may in his discretion extend.

Issues Nos. 7 *and* 8.—Are for the Court Commissioner.

Issue No. 9.—I pass a preliminary decree in favour of the plaintiff for partnership accounts being taken according to the terms contained in the partnership deed. It is not disputed, that the shares of the partners are as shown there. In view of the fact that the estate of the insolvents has vested in the Official Receiver, it will be more convenient that he should act as the Receiver of the business in suit, as he has already been appointed as *interim* Receiver, and I confirm his appointment as such under O. XL, r. 1, C.P.C. Messrs. Kewalram and Srikishindas are

appointed Commissioners to go into the accounts. They should submit their report as early as possible as the final winding up of the insolvency proceedings would to a certain extent depend on the result of this suit. Rs. 50 to be deposited as Commissioner's fees within seven days. Commission returnable within two months. The question of costs will greatly depend on the result of the accounts and will be dealt with by me in the final decree.

P. B. A. *Preliminary decree passed.*
Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 144 OF 1923.
May 25, 1925.
Present:—Mr. Justice Sulaiman
and Mr. Justice Daniels.

EAST INDIAN RAILWAY THROUGH ITS AGENT—DEFENDANT—APPLICANT
versus
BRIJ KISHORE—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 72 (2)—Carriage of goods—Risk Note signed by person delivering goods to Railway—Consignor, whether bound—Risk Note Form "B"—Suit for damages for short delivery—Loss, proof of—Burden of proof.

Where a Risk Note is signed by the person delivering goods to a Railway Company for carriage, the Risk Note is binding upon the consignor by virtue of the provisions of s. 72 (2) of the Railways Act.

Firm Gopal Rai-Phul Chand v. *Great Indian Peninsula Railway*, 82 Ind. Cas. 313; 46 A. 837; (1924) A. I. R. (A.) 621; L. R. 5 A. 575 Civ., and *Secretary of State for India* v. *Firm Jiwan and Abdullah*, 71 Ind. Cas. 609; 45 A. 310; 21 A. L. J. 220; (1923) A. I. R. (A.) 426, followed.

In a suit by a consignor against a Railway Company for recovery of damages for short delivery of goods consigned to the Railway Company for carriage under Risk Note Form "B" the Railway Company cannot claim exemption under the provisions of the Risk Note unless it establishes that the goods have actually been lost to the Company.

East Indian Railway Company v. *Firm Kishan Lal-Tirkha Mal*, 73 Ind. Cas. 986; 45 A. 530; 21 A.L.J. 438; 9 O. & A. L. R. 531; (1924) A. I. R. (A.) 7, followed.

Revision against an order of the Judge, Small Cause Court, Bareilly, dated the 23rd of June 1923.

Mr. *Ladli Prasad Zutshi*, for the Applicant.

Mr. *U. S. Bajpai*, for the Opposite Party.

JUDGMENT.—This is a revision by the East Indian Railway Company from a decree for damages passed by the Court of Small Causes at Bareilly. The learned Judge has overruled the objection of the Railway Company that they were protected by the Risk-Note, Form "B" on the ground that person who delivered the goods to the Company and signed the Risk-Note was neither a consignor nor his authorized agent. There was a further defence by the Railway Company that the goods were lost in a running train robbery. The learned Judge has decided that issue in the negative.

It is impossible to uphold the view of the Court below that the Risk-Note is not binding on the consignor merely because it was not signed by him or his authorized agent. Section 72, sub-s. (2) of the Indian Railways Act provides that such agreement should be in writing signed by or on behalf of the person sending *or delivering* to the Railway Administration. It is, therefore, clear on the language of the section that the signature of the person who delivers the goods would be quite sufficient. This was the view held by a Bench of this Court of which one of us was a member in the case of *Firm Gopal Rai-Phul Chand* v. *Great Indian Peninsula Railway* (1) and subsequently followed by this very Bench in S. A. No. 1145 of 1924, decided on the 5th of November 1924.

We, however, feel that it is impossible to interfere in revision in face of the finding that the defendant has failed to lead any evidence which would show that the consignment in question was contained in the waggon of which the seal was found broken. The learned Judge has commented on the paucity of the evidence and has finally remarked that if the defendant wanted to prove it, it should have taken necessary steps to have the original report filed and to prove that the consignment belonging to the plaintiff was in the waggon which was broken open by thieves.

The plaint was framed as one for recovery of damages for short delivery. There was no admission in the plaint that loss to the Company had occurred. The loss referred to there clearly meant the loss to the plaintiff. It has been held in several cases, *e. g.*, *Secretary of State for India* v. *Firm Jiwan and Abdullah* (2) and *East Indian*

(1) 82 Ind. Cas 313; 46 A. 837; (1924) A. I. R. (A. 621; L. R. 5 A. 575 Civ.
(2) 71 Ind. Cas. 609; 45 A. 380; 21 A. L J. 200; (1923) A. I. R. (A.) 426.

Railway Company v. *Firm Kishan Lal-Tirkha Mal* (3), that the Company cannot claim exemption under the Risk-Note unless it establishes that the goods have actually been lost to the Company. The revision is accordingly dismissed with costs.

Z. K. *Revision dismissed.*

(3) 73 Ind. Cas. 986: 45 A. 530; 21 A. L. J. 438; 9 O. & A. L. R. 531; (1924) A. I. R. (A.) 7.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 37 OF 1924.

April 7, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Crump and Mr. Justice Coyajee.

THE SECRETARY OF STATE FOR INDIA —DEFENDANT—APPELLANT

versus

BHASKAR KRISHNAJI SAMANT—PLAINTIFF—RESPONDENT.

Forest Act (VII of 1878), ss. 75 (d), *84—Rule framed by Bombay Government under s. 75* (b) *with reference to s. 84, validity of—Person making tender binding himself not to withdraw till refusal or acceptance, legality of—Contract Act (IX of 1872), ss. 5, 25—Offer, withdrawal of, before acceptance, effect of—Agreement not to withdraw offer, without consideration, validity of.*

Under s. 5 of the Contract Act a person who makes a proposal is entitled to withdraw it before it is accepted, and under s. 25 of the Act an agreement without consideration not to withdraw a proposal till it is accepted or refused, is void. [p. 508, col. 1.]

The explanation to the rule framed by the Bombay Government under s. 75 (*d*) of the Forest Act with reference to s. 84 of the Act which provides that a person who makes a written tender for a contract should be required to bind himself not to withdraw his tender or bid during the time that may elapse before its acceptance or refusal is communicated to him, having been made in order to carry out the provisions of the Act and not being inconsistent with the Act, cannot be held to be *ultra vires* and is perfectly valid. [p. 508, cols. 1 & 2]

Letters Patent Appeal from the decision of Shah, Acting C. J., differing from Kincaid, J., in First Appeal No. 302 of 1922, confirming the decree passed by the Acting District Judge, Thana, in Suit No. 4 of 1921.

FACTS appear from the following dissenting judgments of Shah, Acting C. J., and Kincaid, J., dated October 16, 1924:—

Shah, Ag. C. J.—It will be convenient in this case to state the few facts which have given rise to this appeal. The Divisional Forest Officer, Western Division, Thana, by a proclamation dated June 25, 1920, invited tenders with reference to certain forest coupes in the Thana District. The tenders were to be submitted on or before August 5, 1920, 1 P. M. The plaintiff submitted a tender in the standard form for several coupes, including coupe No. 4 in Block No. XIX before 1 P. M. on August 5. He offered to take up that particular coupe for Rs. 12,299. Immediately after, however, he discovered that he had committed a mistake in that the sum offered was not intended for that particular coupe but for coupe No. 5, which was near coupe No. 4. At 4-30 on that day the plaintiff's son sent a petition requesting the officer not to sanction the tender for coupe No. 4 as it was submitted under a mistake. The plaintiff and his son also sent a telegram which reached the Divisional Forest Officer at 5-22 P. M. revoking the tender. At 7 P. M. the plaintiff's tender with reference to this coupe was accepted, subject to confirmation by the Conservator of Forests, and such acceptance was notified. On August 6, the Divisional Forest Officer made a report to the Conservator of Forests to the same effect. The plaintiff submitted a petition to the Conservator of Forests explaining how he had committed a mistake, and suggested that the tender should not be accepted. That Officer, however, confirmed the acceptance of the tender by the Divisional Forest Officer. He, however, directed inquiry on the point arising on the plaintiff's application. On September 3, 1920, the plaintiff was informed that his tender was accepted and he was called by a notice of October 15, 1920, to pay one-fourth of the amount. The plaintiff refused to accept the acceptance of the tender, and he refused to pay. He was then informed on October 29, that there would be a re-sale of that coupe. In fact it was re-sold on November 18, and it fetched Rs. 2,246. Then the plaintiff was called upon to pay the deficiency, and on December 14, 1920, his wood was attached. It was, however, released from attachment on April 19, 1921. The plaintiff had already given the necessary notice for the present suit which was filed on April 21, 1921.

The plaintiff prayed for a declaration that the tender of August 5, 1920, did not mature into a contract enforceable by law, the proposal contained in the tender having been revoked before its acceptance, and for an injunction restraining the defendant

from enforcing the so-called contract. He also claimed the return of the War-Bond for Rs. 1,000, and he claimed Rs. 500 as damages for illegal and improper attachment of his goods.

The defendant pleaded that the tender was irrevocable and binding as a contract upon the plaintiff in virtue of a rule made by the Local Government under s. 75 *(d)* of the Indian Forest Act, 1878, and that the sum was liable to forfeiture under the provisions of s. 74.

The plaintiff had based his claim on the allegation that even if it was to be treated as a contract, it was liable to be set aside on the ground of mistake. With reference to that, the defendant pleaded that there was no such mistake, and there was no misrepresentation on the part of the Officers of the Forest Department which would enable the plaintiff to avoid the contract. The plaintiff filed a written statement in reply in which he pleaded that the plea raised in para. 6 of the written statement as to the rule framed under s. 75 (*d*) of the Indian Forest Act was not a good plea. and that the rule relied upon was *ultra vires* and inoperative in law.

On these pleadings the following issues were raised:—

1. Whether the plaintiff could legally revoke his tender after it was made and before it was accepted ?

2. Is the conduct of the defendant referred to in para. 3 of the plaint proved? If so, does it amount to a fresh offer in supersession of the previous offer?

3. Did the plaintiff mistake new coupe No. 4 for new coupe No. 5?

4. If so, was the mistake due to the act of the defendant's subordinates?

5. Whether the defendant was not justified in re-selling the coupe?

6. Whether the plaintiff's timber and fire-wood was illegally attached by the defendant and if so has the attachment caused the plaintiff a loss of Rs. 500 as stated in para. 4 of the plaint?

7. Is the plaintiff entitled to the return of the War-Bond of Rs. 1,000?

The learned Trial Judge found that the plaintiff could legally withdraw his tender after it was made and before it was accepted. He found on the second issue that the department was prepared to reduce the sum to Rs. 8,000, but that it did not amount to a fresh offer in supersession of the previous offer. As regards Issue No. 3, the Trial Court found in the affirmative, but on Issue No. 4 the Court held that the mistake was not due to the act of the defendant's subordinates. No finding on Issue No 5 was considered necessary. As regards Issue No. 6, the Trial Court came to the conclusion that the attachment was illegal, but no damages were proved. Accordingly the Trial Court passed a decree in favour of the plaintiff declaring that the tender Ex. 24, did not amount to a contract enforceable by law, and granted an injunction perpetually enjoining the defendant from enforcing the terms of the tender. He further ordered delivery to the plaintiff of the War-Bond of Rs. 1,000. The rest of the plaintiff's claim was rejected. Each party was ordered to bear his own costs.

The defendant has appealed, and the plaintiff has filed cross-objections. I may first dispose of the question of fact which arises on the cross-objections of the plaintiff that this tender was brought about by a misrepresentation on the part of the Officers of the Forest Department. In the lower Court the case made by the plaintiff was that the mistake on his part as regards the coupe number was due to the action of the Forest Department. Before us the learned Pleader has relied upon the provisions of s. 18 of the Indian Contract Act, and particular reliance is placed on sub-s. (3), which provides that misrepresentation would include causing. however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

We have heard Mr. Desai on the evidence, and we intimated to him in the course of the argument our opinion that the alleged misrepresentation was not proved. It is possible that there may be some room for a man going to the spot to get the impression that tenders were invited for coupe No. 5 also. As a fact no tenders for coupe No. 5 were invited, but for various coupes including coupe No. 4. It is very doubtful to my mind whether a person observing carefully the marks there, could have confounded the two coupes Nos. 4 and 5. But that plea is hardly open to a party who has not gone there to be misled in some manner by the apparent condition of the marked trees. The lower Court has rightly found that the plaintiff was honestly under the impression that he was making an offer for coupe No. 5, and not coupe No. 4. The value of coupe No. 4 is much

below the sum offered in the tender, and that reasonably speaking such a sum would not be offered for coupe No. 4. It may be that the plaintiff was under that mistaken impression. But it does not follow that the Department contributed to that mistake in any sense or that they represented to the plaintiff that coupe No. 5 was really coupe No. 4. On that point, therefore, the contention of the plaintiff must be disallowed and the plea that even if the tender amounts to a contract otherwise enforceable, it is liable to be set aside on the ground of mistake or misrepresentation must fail.

The principal question in the case is as to whether the tender submitted by the plaintiff is revocable or not. The material terms of the tender are these:—

"In respect of (the coupes) mentioned in the accompanying schedule, out of (the coupes stated) therein tender for a sum stated against each of them is submitted. If this tender is passed, then I shall perform all things which it will be obligatory (on me) to perform agreeably to the terms of the contract attached to this tender or otherwise. If I fail to do so, the penalty or the sums of moneys mentioned in the said terms may be forfeited and credited in the name of the Secretary of State for India in Council or his successor-in-office. I further agree that I will not withdraw this tender during the time that will be required for intimation of the acceptance or non-acceptance of the tender being given to me and if I do so withdraw then I am liable to pay the whole sum of this tender or such amount on account of deficiency as in the opinion of the Conservator or the Deputy Conservator of the Circle may be considered necessary to make good the whole of the loss and damages that may be suffered by Government in consequence therof and I shall pay the same. Along with this tender I have sent a War-Bond of Rs. 1,000 (in words) one thousand in token of good faith. If this tender is passed and if I do not put my signature on the '*kabuliyat*' which I will be required to do as per clause 1 of the conditions, or if I do not pay in full the one-fourth of the amount of the tender or if I withdraw the tender during the time that will be required for intimation being given to me as regards the acceptance or non-acceptance, then the whole of the amount sent with the tender in token of good faith as aforesaid may be forfeited and (credited) to the Secretary of State or his successor-in-office."

According to these terms the tender is not revocable. It is clear that in spite of the express terms of the tender, it would be revocable under s. 5 of the Indian Contract Act before acceptance, and the agreement not to revoke would be without consideration and, therefore, void according to the ordinary law. This position is not contested by the learned Advocate-General, and so far it is clear, because an agreement not to revoke a tender would be void under s. 25 of the Indian Contract Act; and any tender before acceptance is revocable under s. 5 of the Act.

The learned Advocate-General, however, relies, upon a rule framed under s. 75 (*d*) of the Indian Forest Act by the Local Government. It is urged that according to that rule the condition that the tender cannot be revoked is legal, that in spite of the provisions of ss. 5 and 25 of the Indian Contract Act, the agreement not to revoke is enforceable and that the revocation is invalid. The notification about this rule is in these terms:—

In exercise of the powers conferred by s. 75, cl. (*d*), of the Indian Forest Act, 1878, (VII of 1878), as amended by the Indian Forest Act, (V of 1890), and in supersession of Government Notification in the Revenue Department No. 2799, dated the 31st March 1896, the Governor-in-Council is pleased to make the following rule, with reference to s. 84 of the said Act amended as aforesaid, namely:—

"Whoever enters into any contract with any Forest Officer acting on behalf of Government, shall, if so required by such Forest Officer, bind himself by a written instrument to perform such contract.

Explanation:—A person who makes a written tender for a contract, or who signs the conditions of an auction sale at which he is a bidder, such tender or conditions of sale being on or in form furnished by a Forest Officer for that purpose, whereby he

(*a*) binds himself to perform the contract for which he tenders or bids, in the event of his tender or bid being accepted, or

(*b*) binds himself not to withdraw his tender or bid during the time that may elapse before its acceptance or refusal is communicated to him, shall be deemed to have been required by such Forest Officer to bind himself as

aforesaid, and in case (*a*) on the acceptance of his tender or bid, or in case (*b*) on the making of his tender or bid, to have bound himself accordingly, within the meaning of this rule; and any such person need not enter into a separate written instrument for the purpose, unless specially so required by the Forest Officer with whom he contracts."

This rule purports to have been made with reference to s. 84 of the Indian Forest Act under the powers conferred upon the Local Government by s. 75 (*d*). Its effect is to make a tender irrevocable before acceptance in spite of s. 5 of the Indian Contract Act and to make an agreement not to withdraw a tender before acceptance enforceable as a contract in spite of s. 25 of the Indian Contract Act and to bring a writing within the scope of s. 84 of the Indian Forest Act which but for the rule would not be covered by it.

The lower Court has held that the general provisions of the Indian Contract Act are not abrogated by this rule so far as persons submitting such tenders are concerned. It has applied the test that "where the language of the Legislature admits of two constructions and if construed in one way would lead to obvious injustice or absurdity the Courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words." After comparing the language of the present rule with the rule as it was framed in 1896, the learned Trial Judge came to the conclusion that it did not abrogate the general law of contract. He did not consider it necessary to examine the question whether the rule was *ultra vires* if it had the effect of abrogating the general law of contract on the particular points. The learned Advocate-General has argued that its effect is to make an offer irrevocable before acceptance and to make an agreement binding as a contract, which would not be irrevocable and binding according to the ordinary law of contract and to that extent abrogates or modifies the Law of Contract. I think the contention of the Advocte-General so far is sound; and I am unable to accept the view taken by the lower Court on this point. It is quite true that the rule does not in terms say that inspite of anything contained in ss 5 and 25 of the Indian Contract Act, the tender shall not be revocable before acceptance and that the agreement not to revoke the tender before acceptance shall be enforceable as a contract, its effect is clear; I cannot say that the words of the Explanation are ambiguous in any sense. Further I cannot say that the agreement not to withdraw a tender before acceptance or to pay a certain sum in case of breach as if it were a contract necessarily leads to obvious injustice or absurdity. It is, therefore, necessary to examine the other objections to the validity of the rule raised in the argument before us. The objection is that the rule or rather the Explanation is in excess of the statutory power authorizing it and that it is repugnant to the Statute and to the general principles of the Law of Contract.

In dealing with these objections it is necessary to bear in mind the scope of ss. 75 and 84. Under the Indian Forest Act, the Local Government has power to frame rules for various purposes under different sections. For instance under ss. 15, 25 cls. (*a*) and (*i*), 31, 35, 41 and 51, the Local Government can frame rules for various purposes connected with the Indian Forest Act. We then come to Chapter XIII relating to subsidiary rules which contain ss. 75 to 77. Section 75 provides as follows:—

"The Local Government may from time to time make rules—

(*a*) to prescribe and limit the powers and duties of any Forest Officer under this Act;

(*b*) to regulate the rewards to be paid to officers and informers out of the proceeds of fines and confiscations under this Act;

(*c*) for the preservation, reproduction and disposal of trees and timber belonging to Government but grown on lands belonging to or in the occupation of private persons; and

(*d*) generally, to carry out the provisions of this Act."

Section 77 provides that all rules made by Local Government under this Act shall be published in the Local Official Gazette and shall thereupon, so far as they are consistent with this Act, have the force of law. The extent of the authority, so far as the particular rule is concerned, is defined by the words "generally to carry out the provision of this Act." I may also refer to s. 84, as the rule is made expressly with reference to that section. It is in these terms:—

"When any person, in accordance with any provision of this Act or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond

or instrument that he, or that he and his servants and agents, will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in s. 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land revenue"

It is clear from the words of the section that apart from this rule, an agreement in writing not to withdraw a tender would not be within the scope of the section In the first place the undertaking would not be in accordance with any provisions of the Act or compliance with any rule made thereunder—I mean apart from the rule in question. Besides the agreement would not be binding according to law: and there would be no enforceable covenant under the section. In fact it is not contested by the learned Advocate-General that apart from this rule the covenant not to withdraw a tender before acceptance would not be binding and would not be within the scope of the section. The section presupposes a binding contract or covenant.

The power to make subsidiary rules must be strictly circumscribed by the scope of the Act. The expression "generally to carry out the provisions of the Act" should be construed *ejusdem generis* with the previous clauses. At the same time I think it should be liberally construed so as to enable the Local Government to make rules to do all subsidiary things, with a view to facilitate the carrying out of the provisions of the Act. It is not easy to define the exact scope of the expression nor is it necessary to attempt to do so. But I feel clear that it cannot be so construed as to confer a general power upon the Local Government to modify to any extent the existing provisions of law to serve the ends of the Indian Forest Act. Such a wide power, if intended to be conferred, can be conferred, in my opinion, only by express and appropriate words to that effect. I cannot hold that the Legislature could intend to confer powers to modify any existing law or Statute for the purposes of the Indian Forest Act by the use of such a general expression as is used in cl. (*d*) of s 75. No authority is cited to show that a power to make rules generally to carry out the provisions of an Act can include power to make rules in modification of the existing enactments unless such modification is necessarily involved in or implied by any specific provisions of the Act. There can be no necessary implication in this case, as there is no necessary conflict between the provisions of the Indian Forest Act and the Indian Contract Act on the points with which we are concerned. It cannot be said, for instance, that without modifying the provisions of ss. 5 and 25 in the sense indicated in the rule the provisions of the Indian Forest Act cannot be carried out. The Local Government may quite rightly consider such a modification desirable; but they cannot enact a rule having the force of law under the powers conferred by these general words so as to modify the ordinary law. For, if this were so, there would be no limit to the extent to which the rule-making authority can modify the general law to suit the requirements (according to their view) of the Indian Forest Act. I am clearly of opinion that under cl. (*d*) the Local Government have no such general power to modify the ordinary law governing contracts, unless it can be shown that it is necessarily implied by the provisions of any particular section of the Act.

The learned Advocate General has argued that the only limitation is that the rule should be consistent with the provisions of the Indian Forest Act and that if it is not inconsistent the Local Government may in their discretion modify any provision of law to suit the requirements of the Act. Though the argument has not been put exactly in these terms in substance that is the argument as I understand it, I am, however, unable to accept it. The Legislature could not be held to have conferred such wide powers in the absence of any clear words to indicate that meaning. Assuming, therefore, that it is consistent with the provisions of the Act, I think that the authority is exceeded in so far as the rule seeks to prohibit the withdrawal of a tender before acceptance in spite of the provisions of s. 5 of the Indian Contract Act and to make the covenant not to withdraw a tender before acceptance enforceable as a contract in spite of s. 25 of the Indian Contract Act.

The Explanation to the rule which is in substance intended to modify the existing law that a tender is revocable before acceptance and that an agreement not to withdraw the tender before acceptance is

void as being without consideration, is in excess of the authority conferred upon the Local Government under cl. (*d*) of s. 75.

This view derives support from the circumstance that the Legislature has carefully provided in terms where any modification of the Indian Contract Act is desired. Section 84 of the Act contains an express reference to s. 74 of the Indian Contract Act. If the Local Government had authority to modify the general law to carry out the provisions of the Act, s. 84 would have been hardly necessary. The Local Government could frame a rule to that effect and according to the present contention of the learned Advocate-General it would be valid. The cases referred to by the Advocate-General do not touch this point. The case of *Rockett* v. *Clippingdale* (1) does not help us in any way. That was a case of repeal by implication of a certain Statute in virtue of a rule framed under express powers conferred under another Statute with reference to the specitic question of costs. The decision was based upon *Garnett* v. *Bradley* (2) and a reference to that case makes it clear that it cannot help us in this case. There is no scope here for any inference as to necessary implication with reference to such divergent Acts as the Indian Forest Act and the Indian Contract Act.

It is argued by Mr. Desai that the rule is open to a further objection that it is not consistent with s. 84. I have already pointed out that apart from the rule the agreement in writing not to withdraw a tender would not be within the scope of the section. The effect of the rule is to bring a particular writing within the scope of the section, which is not otherwise within its scope. In plain terms the rule seeks to make an addition to s. 84. I doubt whether a tender with a covenant not to withdraw it before acceptance can be said to have been given in accordance with the provisions of the Act or in compliance with any rule thereunder as contemplated by s. 84. The effect of the rule is to declare that as binding and valid which but for the rule would not be binding and treated as valid for the purposes of s. 84. On the whole I think that this rule is intended to add to the provisions of s. 84 by declaring writings to be made under a rule under the Act, which in plain terms are writings not in accordance with the provisions of the Act or compliance of any other rule under the Act, but independent writings containing offers which, if and when accepted, would bring a person within the scope of the section. I find it difficult to hold that it is consistent with s. 84 to add to the scope of the section in that way In the result I am of opinion that the Explanation of the rule, with which we are concerned, is *ultra vires*.

The next point relates to the attachment. The attachment would be illegal if the withdrawal of the tender was legal. As I hold the withdrawal to be legal, I accept the finding of the lower Court that the attachment was illegal.

As regards damages the lower Court has held that the plaintiff has failed to prove any damages. I should have been inclined to award some damages as an illegal attachment does ordinarily mean some inconvenience and loss; but it is difficult to say on this record that any damages are *proved* or that the lower Court is wrong in holding that no damages are proved. In any case I would not award more than Rs. 50 as damages, and for that small sum I do not consider it proper under the circumstances to vary the decree. As regards costs the plaintiff should get his costs as regards the claim for illegal attachment, even though he may fail to prove damages. Though in the end he succeeded, he raised questions of fact on which he failed. In apportioning the costs, the lower Court was entitled in the exercise of its discretion to direct each party to bear his own costs. I would, therefore, confirm the decree of the lower Court and dismiss the appeal and cross-objections with costs.

As we are both agreed that the cross-objections fail, they are dismissed with costs.

As regards the appeal, in view of the difference of opinion the decree is confirmed under s. 98, sub-s. (2), of the C. P. C.

Kincaid, J.—The facts of the case have been fully stated in the careful judgment of the Trial Court and are briefly as follows:—

By a proclamation, dated June 25, 1920, the Divisional Forest Officer, Western Division, Thana, invited tenders for certain coupes in the Bassein Range. The plaintiff

(1) (1891) 2 Q. B. 293; 60 L. Q. B. 782; 63 L. T 641.
(2) (1878) 3 App Cas. 944 at p. 969; 48 C. L. J. Ex. 186; 39 L. T. 261; 26 W. R. 698.

Krishnaji Bhikaji Samant made tenders for some of them including coupe No. 4. For coupe No. 4 he tendered on August 5 about 1 P. M. Rs. 12,299 and with his tender sent, as required by the proclamation, a War-Bond for Rs. 1,000 being five and a half per cent. of the tender. Subsequently according to his own story, he learnt that what he had thought was coupe No. 4 was really coupe No. 5 which was not for sale until 1921. He thereupon sent a letter and a telegram to the Divisional Forest Officer revoking his tender. They reached the Divisional Forest Officer the same day, but as the tender was over Rs. 5,000 and beyond the said officer's jurisdiction, he referred Samant to the Conservator of Forests. On August 6, Samant wrote to the Conservator informing him that he had revoked his tender. On August 10, Samant received a registered letter from the Conservator informing him that his tender had been accepted.

Samant maintained that as he had revoked his tender before acceptance the Conservator could not afterwards accept it. But the Forest Department thought otherwise and on November 18, 1920, sold coupe No. 4 by public auction for Rs. 2,246. On November 27, the Forest Department served on Samant a notice calling on him to pay the difference between Rs. 2,246 and Rs. 12,299. Samant declined to pay and on December 10 the Department attached his wood worth Rs. 575 but on April 12, 1921, released it when Samant furnished security.

In November 1920, Samant had served a notice on the Secretary of State as required by s. 80, C. P. C. On April 21, 1921, he filed the present suit asking for a declaration that the tender of August 5, 1920, did not mature into a contract enforceable by law and for an injunction restraining the defendant Secretary of State from enforcing it. The plaintiff further asked for the return of the War-Bond for Rs. 1,000 and Rs. 500, damages for illegal attachment of his wood.

The learned Trial Judge found that the plaintiff was entitled to the declaration and injunction sought and the return of the Rs. 1,000. He did not award any damages for the attachment of the wood and ordered each party to bear his own costs.

Against this finding and decree the Secretary of State has appealed.

The Advocate-General and the Government Pleader appeared for the appellant. Mr. Desai appeared for the respondent.

The learned Advocate-General has fairly admitted that under the ordinary Law of Contract (s. 5, Act IX of 1872) the defendant could not hold the plaintiff to a tender revoked before acceptance. He has, however, relied on the following rule to be found at p. 170, Vol. II, Local Rules and Orders under enactments applying to Bombay.

"In exercise of the powers conferred by s. 75, cl. (*d*) of the Indian Forest Act, 1878 (VII of 1878) as amended by the Indian Forest Act (V of 1890) and in supersession of Government Notification in the Revenue Department No. 2799, dated March 31, 1896, the Governor-in-Council is pleased to make the following rule, with reference to s. 84 of the said Act amended as aforesaid, namely:—

RULE.

Whoever enters into any contract with any Forest Officer acting on behalf of Government, shall, if so required by such Forest Officer, bind himself by a written instrument to perform such contract.

Explanation:—A person, who makes a written tender for a contract, or who signs the conditions of an auction sale at which he is a bidder, such tender or conditions of sale being on or in a form furnished by a Forest Officer for that purpose, whereby he

(*a*) binds himself to perform the contract for which he tenders or bids, in the event of his tender or bid being accepted, or

(*b*) binds himself not to withdraw his tender or bid during the time that may elapse before its acceptance or refusal is communicated to him, shall be deemed to have been required by such Forest Officer to bind himself as aforesaid, and in case (*a*) on the acceptance of his tender or bid, or in case (*b*) on the making of his tender or bid, to have *bound himself accordingly*, within the meaning of this rule; and any such person need not enter into a separate written instrument for the purpose, unless specially so required by the Forest Officer with whom he contracts." (The italics are mine).

It is as well at this point to quote also s. 75 and s. 7 of the Indian Forest Act (VII of 1878). Section 75 runs as follows:—

"The Local Government may from time to time make rules—

(*a*) to prescribe and limit the powers and duties of any Forest Officer under this Act;

(*b*) to regulate the rewards to be paid

to Officers and informers out of the proceeds of fines and confiscations under this Act;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act".

Section 77 as amended runs as follows:—

"All rules made by the Local Government under this Act shall be published in the Local Official Gazette, and shall thereupon, so far as they are consistent with this Act, have the force of law."

Now, as the previously quoted rules have the force of law so argued the learned Advocate-General, Samant shall be deemed to have bound himself irrevocably when he made his tender, although under s. 5 of the Indian Contract Act he could ordinarily have revoked his tender before its acceptance. But the learned Pleader for the respondent has objected that s. 77 limits the powers of the Local Government to make rules only so far as they are consistent with the Indian Forest Act. Mr. Desai has argued that the rules are not consistent with the Act in that there is nothing therein which adumbrates such a drastic measure. But the Act was passed to facilitate the profitable exploitation of Indian forests and the rules now in question clearly do facilitate the sale of forest produce. Tenders over Rs. 5,000 have to receive the sanction of the Conservator of Forests. That sanction cannot be obtained without some delay. If in the interval it was open to forest contractors to revoke their tenders the whole work of the Forest Department to further the sale of their coupes would have to begin anew.

In this connection I would quote a pertinent passage from Richardson, J.'s judgment in *Gobordhone Das Deora* v. *Doolichand Sethia* (3) (page 982*):—

"The Courts will approach a rule purporting to be made by the Local Government or by one of its principal administrative departments under statutory powers with respect and with the desire so to construe it *ut res magis valeat quam pereat.*"

Mr. Desai, however, has further contended that rules, to use Maxwell's words: "Interpretation of Statutes, page 481 (5th Edition)" must "on pain of invalidity be not unreasonable, nor in excess of the Statutory power authorizing them, nor repugnant to that Statute or to the general principles of law." The learned Pleader has maintained that the rules are unreasonable and opposed to the general principles of law. The learned Judge of the lower Court has also indicated that in his view the rules are absurd and unjust. I find myself unable to accept either view. It must be remembered that irrevocable tenders are called for every day in business circles. There they are known as "firm offers." They may not be enforceable at law but if a business man resiled from a "firm offer," he would lose his reputation for honesty—which would be much worse for him. I have already shown that unless tenders are irrevocable the work of the Forest Department is greatly hindered. It is thus not, in my opinion, unreasonable, absurd or unjust that the Department should issue rules which are conformable with every day business practice and help the administration to collect revenue. The next question is whether the rules are in excess of the statutory power authorizing them. The words of s. 77 are of the widest character: Provided the rules are made by the Local Government under the Indian Forest Act, that they are published in the Local Official Gazette and are consistent with the Act they shall have the force of law. It is not alleged that the rules have not been made by the Local Government under the Indian Forest Act nor that they have not been published in the Local Official Gazette. They are, as I have shown, consistent with the Act. The only question that remains unconsidered is whether the rules are repugnant to the general principles of law. They certainly are opposed to s. 5 of the Indian Contract Act. Section 5 of the Indian Contract Act is based on the principle embodied in s 25 that an agreement made without consideration is void. A man can revoke a proposal before its acceptance because there is no consideration for the proposal. But s. 25 does not embody an unalterable principle. It contains no less than three exceptions. As it appears to me, at any rate, there is no reason why a rule, which enables a Department to collect Government revenue and has been in force for twenty years without hindrance should not add another exception to s. 25. It has been held in *Rockett* v. *Clippingdale* (1)

(3) 61 Ind. Cas. 210; 48 C 955; 25 C. W. N. 661; 33 C. L. J. 551; 22 Cr. L. J. 354.

*Page of 48 C.—[*Ed.*]

that rules having the force of law, if promulgated later than a Statute, can repeal the provisions of a Statute. In the same way they can, in my view, add to the provisions of a Statute

This brings me to a somewhat similar contention advanced by the learned Pleader for the respondent. He has urged that the rules are promulgated with reference to s. 84 of the Indian Forest Act and that s. 84 of the Indian Forest Act contains no provision whatever regarding an irrevocable tender. To allow the executive to add to a section of the Statute is really to enable it to usurp the power that belongs to the Legislature. But in advancing this argument, as it seems to me the learned Pleader loses sight of s. 77. The Legislature deliberately delegated their full powers to the executive to make rules subject to certain provisions and further deliberately pronounced that such rules should have the force of law. In other words, the executive have not usurped any power, but the Legislature have bestowed on the executive of their own free-will that power. It will not be denied that the rules could legally have been added to the Statute by the Legislature. I have shown that all the required provisions have been fulfilled. It, therefore, follows that the executive have the power of adding by way of rules to the Statute. In this connection I would quote the weighty words of Lord Herschell in the case of *Institute of Patent Agents* v. *Lockwood* (4) (page 357*): "It is said that this would be a very large power for the Legislature to commit to any other body; but it must be remembered that it is committed to a public department." Nor should I forget the words of a hardly less eminent jurist Lord Alverstone in *London County Council* v. *Bermondsey Bioscope Co.* (5): "This case is an illustration of the well-recognized principle that where there is a competent authority to which an Act of Parliament entrusts the power of making regulations, it is for that authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported, unless they are manifestly unreasonable or unfair."

For the above reasons I am of opinion that these rules issued by the Local Government under s. 75 of the Indian Forest Act were *intra vires*, and that the plaintiff Samant having once made his tender could not revoke it even before acceptance. In these circumstances the Government were justified in recovering the amount due from him as an arrear of land revenue and committed no wrong in attaching his wood.

I would, therefore, allow the appeal with costs throughout. But few words are needed to dispose of the cross-objection. The respondent's Pleader has contended that the Forest Department misled Samant by putting marks on Forest coupe No. 5 similar to those on Forest coupe No. 4. But the plaintiff has admitted that before making his tender he did not himself go to the spot. He sent his son-in law, who appears to have made some casual enquiries from the neighbouring peasants. A plaintiff who has been so negligent cannot complain of being misled. I would dismiss the cross-objection with costs. I would reverse the finding and decree of the lower Court and dismiss the plaintiff's suit.

Mr. *Kanga*, Advocate-General (with him Mr. *S. S. Patkar*, Government Pleader), for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.

Macleod, C. J.—On June 25, 1920, the Divisional Forest Officer, Western Division, Thana, by a proclamation, invited tenders with reference to certain forest coupes in the Thana District. The tenders were to be submitted on or before August 5, 1920, 1 P. M. The plaintiff submitted a tender in the standard form for several coupes, including coupe No. 4 in Block No. XIX before 1 P. M., on August 5. He offered to take up that particular coupe for Rs. 12,299. Immediately after, however, he discovered that he had committed a mistake in that the sum offered was not intended for that particular coupe, but for coupe No. 5, which was near coupe No. 4. He then sought to revoke his tender. At 4-30 on that day the plaintiff's son sent a petition requesting the Officer not to sanction the tender for coupe No 4 as it was submitted under a mistake. The plaintiff and his son also sent a telegram which reached the Divisional Forest Officer at 5-22 P. M., revoking the tender. At 7 P. M. the plaintiff's tender with refer-

(4) (1894) A. C. 347.

(5) (1911) 80 L. J. K. B. 141; 1 K. B. 445; 27 T. L. R. 141; 103 L. T. 760; 75 J. P. 53; 9 L. G. R. 79.

*Page of (1894) A. C.—[*Ed.*]

ence to this coupe was accepted, subject to confirmation by the Conservator of Forests, and such acceptance was notified. The Conservator of Forests eventually accepted the tender and called upon the plaintiff by notice of October 15, 1920, to pay one-fourth of the amount. The plaintiff refused to accept the acceptance of the tender, and refused to pay. He was then informed on October 29, that there would be a re sale of that coupe. In fact it was re-sold on November 18, and it fetched Rs. 2,246. Then the plaintiff was called upon to pay the deficiency, and on December 14, 1920, his wood was attached. It was, however, released from attachment on April 19, 1921.

The plaintiff filed this suit after giving the necessary notice on April 21, 1921. He prayed for a declaration that the tender of August 5, 1920, did not mature into a contract enforceable by law, the proposal contained in the tender having been revoked before its acceptance, and for an injunction restraining the defendant from enforcing the so-called contract. He also claimed the return of the War-Bond for Rs. 1,000, and he claimed Rs. 500 as damages for illegal and improper attachment of his goods.

The defendant pleaded that the tender was irrevocable and binding as a contract upon the plaintiff in virtue of a rule made by the Local Government under s. 75 (*d*) of the Indian Forest Act, 1878, and that the sum was liable to forfeiture under the provisions of s. 84.

The Trial Judge found that the plaintiff could legally withdraw his tender after it was made and before it was accepted, and passed a decree in favour of the plaintiff granting a declaration and injunction as prayed and also directing delivery to the plaintiff of the War-Bond of Rs. 1,000. The rest of the plaintiff's claim was rejected.

The defendant appealed to the High Court. The learned Judges of the High Court differed. Mr. Justice Shah held that the rule on which the defendant relied was *ultra vires*, while Mr. Justice Kincaid held to the contrary. As the opinion of the Senior Judge prevailed, under s. 98, C. P. C., the decision of the Court below was confirmed.

The defendant has now filed this Letters Patent Appeal, and the question whether the rule on which the defendant relies is *ultra* or *intra vires* has been fully argued before us.

Section 75 of the Indian Forest Act gives the Local Government power from time to time to make rules *inter alia* under heading "(*d*), generally, to carry out the provisions of this Act."

Section 77 provides that all rules made by the Local Government shall be published in the Local Official Gazette, and shall thereupon, so far as they are consistent with the Act, have the force of law.

Section 84 is in the these terms:—

"When any person, in accordance with any provision of this Act or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond or instrument that he, or that he and his servants and agents, will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in s. 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land revenue."

That section was added by Act V of 1890, and was amended slightly by Act I of 1918. In 1908 the Local Government notified as follows "in exercise of the power conferred by s. 75 (*d*) of the Indian Forest Act, 1878, as amended by Act V of 1890, and in supersession of the Government Notification in the Revenue Department No. 2799, dated March 31, 1896, the Governer-in-Council is pleased to make the following rule with reference to s. 84 of the said Act amended as aforesaid:—

"Whoever enters into any contract with any Forest Officer acting on behalf of Government, shall, if so required by such Forest Officer, bind himself by a written instrument to perform such contract."

It is quite clear that that rule was a rule framed for the purpose of carrying out the provisions of the Act. To the rule was added an Explanation as follows:—

"*Explanation*:—A person, who makes a written tender for a contract, or who signs the conditions of an auction-sale at which he is a bidder, such tender or conditions of sale being on or in a form furnished by a Forest Officer for that purpose, whereby he

(*a*) binds himself to perform the contract for which he tenders or bids, in the event of his tender or bid being accepted, or

(*b*) binds himself not to withdraw his tender or bid during the time that may elapse before its acceptance or refusal is communicated to him, shall be deemed to have been required by such Forest Officer to bind himself as aforesaid, and in case (*a*) on the acceptance of his tender or bid, or in case (*b*) on the making of his tender or bid, to have bound himself accordingly, within the meaning of this rule; and any such person need not enter into a separate written instrument for the purpose 'unless specially so required by the Forest Officer with whom he contracts.' "

The tender which the plaintiff signed contained these words:—

"I further agree that I will not withdraw this tender during the time that will be required for intimation of the acceptance or non-acceptance of the tender being given to me and if I do so withdraw (the tender) then I am liable to pay the whole sum of this tender or such amount on account of deficiency as in the opinion of the Conservator or the Deputy Conservator of the Circle may be considered necessary to make good the whole of the loss and damages that may be suffered by Government in consequence thereof and I shall pay the same."

It is admitted on both sides that that agreement under s. 25 of the Indian Contract Act is an agreement without consideration, and, therefore, was void. Further that under s. 5 of the Indian Contract Act, a person who makes a proposal is entitled to withdraw it before it is accepted.

Now, according to the Explanation to the rule which I have just read, when the plaintiff signed the tender, he must be deemed to have been required by the Forest Officer to bind himself to perform the contract, and further to have bound himself not to withdraw his tender or bid during the time that might elapse before its acceptance or refusal was communicated to him.

Then turning to s. 84 of the Indian Forest Act, the plaintiff in compliance with that rule had bound himself by an instrument to perform a duty or act, or covenanted by such instrument to abstain from a certain act, and the penalty for failure to observe that covenant would be the penalty mentioned in s. 84. I may point out here that the words "in compliance with any rule made thereunder" were not exactly the right words that should have been used and it would have been plainer if the Legislature had used the words "by virtue of any rule made under the provisions of the Act." But we do not think that that slight error in drafting the section would affect the question whether the rule was *intra* or *ultra vires*. It was contemplated that rules might be made whereby persons should bind themselves or covenant to perform a duty or act or abstain from any act. Consequently we think that the rule was made not only to carry out the provisions of the Act, but also in order to amplify the provisions of s. 84. We see no reason to think, therefore, that the rule can be said to be *ultra vires* of the Local Government.

It was contended that the Local Government would have no power to promulgate any rule which made an alteration in the ordinary Law of Contract unless express power to do so had been given in the Act. We cannot agree with that argument. Reliance was then placed on a passage in Maxwell on Interpretation of Statutes, 6th Edition, page 523:—

"Rules and bye-laws made under the statutory powers enforceable by penalties are construed like other provisions encroaching on the ordinary rights of persons. They must, on pain of invalidity, be not unreasonable, nor in excess of the statutory power authorizing them, nor repugnant to that Statute or to the general principles of law."

It cannot be said that this rule we are now considering is in excess of the statutory power authorizing it, nor is it repugnant to the Statute. It only remains to be considered whether it is repugnant to the general principles of law. That phrase is a somewhat wide one, and we do not think that it excludes the power to make a rule which is repugnant to a particular Statute in force at the time. As painted out by the Advocate General, it is neither unreasonable nor unfair, and there was a distinct object in passing that rule, namely, to facilitate the operations of the Forest Officer for disposal of the forest produce. An offer or tender for a certain amount had to be submitted to the Divisional Forest Officer; and the tender in this case being for more than Rs. 5,000 that officer had no authority to finally accept it, but had to submit it for approval to the Conservator of Forests; consequently there must necessarily have been some delay before that tender could be accepted and the acceptance notified to the tenderer and if it was open to a tenderer to revoke his tender before the acceptance

of it was notified to him, it would be extremely difficult for the Forest Officers to conduct sales of forest produce

It has, therefore, not been shown to us that the Local Government had no power to promulgate a rule which was contrary to the provisions of ss. 5 and 25 of the Indian Contract Act; as the Local Government had special power to make rules, so far as they were consistent with the Indian Forest Act, and as such rules, when made, have the force of law, the result must be that this rule being made in order to carry out the provisions of the Act, and not being inconsistent with the Act, must be considered as taking its place within the Act.

We think the appeal must succeed and the plaintiff's suit dismissed. The appellant will get his costs in this Court and in the lower Appellate Court, but we do not disturb the order of costs in the Trial Court. The cross-objections are dismissed with costs.

With regard to the claim made to us, after judgment was delivered, by the respondent that he deposited Rs. 200 for each of the five coupes for which he tendered, making Rs. 1,000 for all, so that he would be entitled to a refund of Rs. 800 in any event, we can only say that there are no materials before us on which we can decide whether the plaintiff is entitled to such a refund. He never mentioned that claim in the proceedings in the Trial Court, and there was no issue raised thereon. It would be impossible for us, sitting as we are in appeal under the Letters Patent, to decide a question of fact on which there is no evidence. If, however, as a matter of fact the plaintiff tendered for five coupes and made a deposit of Rs. 200, as he now says, against each separate tender, then if the tender was not accepted for four coupes, ordinarily speaking he would be entitled to the return of his deposit *pro tanto*, and we presume he is still entitled to ask for that return, as the period of limitation would run from the date of demand of such deposit and its refusal.

Crump, J.—I concur.

Coyajee, J.—I concur.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1281 OF 1923.

June 4, 1925.

Present:—Mr. Justice Sulaiman.

Syed ZAHID ALI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUKHU LONIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Trespass—Compensation, suit to recover—Building constructed on land—Relief—Duty of Court—Estoppel, when arises—Evidence Act (I of 1872), s. 115.

No one can by merely trespassing upon the land of another and constructing costly buildings on it claim a right to retain possession of the land or to compel the owner to receive compensation for the land. Unless it can be established that the defendant was making constructions under some *bona fide* mistake of which the plaintiff was aware and in spite of this knowledge the plaintiff deliberately refrained from intervening and thereby led the defendant to believe that he was right in his estimation, there would be no estoppel. [p. 511, col. 1.]

Beni Ram v. *Kundan Lal*, 21 A. 496 at p. 502; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.), *Ganga Din Sonar* v. *Jagat Tiwari*, 25 Ind. Cas. 198; 12 A. L. J. 1026 and *Fatehyab Khan* v. *Muhammad Yusuf*, 9 A. 434; A. W. N. (1887) 82; 5 Ind. Dec. (N. S.) 725, followed.

Where a plaintiff sues for recovery of proprietary possession of land over which the defendant has taken possession by building a house, there is no discretion in the Court to refuse to grant the relief. [*ibid.*]

Second appeal against a decree of the Second Additional District Judge, Gorakhpur, dated the 4th of May 1923.

Mr. *Mushtaq Ahmad*, for the Appellants.

Mr. *M. N. Raina*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit brought by certain *zemindars* for recovery of proprietary possession over two plots of land.

The plaintiffs' case was that the defendants made some constructions without their information and permission on the larger plot, and that subsequently they built another house on the smaller plot.

The defence raised by the contesting defendants was that with regard to the larger house their old house which stood on the site and had been of thirty years' standing fell down some eight years before the suit and the defendants repaired it (rebuilt it?) on the old foundation. They denied the plaintiffs' allegation that it was built only a short time before the suit. As to the smaller house, their plea was that there was a thatched house on this site in which the defendants used to keep their chaff and tied their bullocks and buffaloes and which they with the permission of the plaintiffs

converted into a tiled house some two years before the suit.

The Court of first instance decreed the claim with regard to the smaller house, and that decree has been affirmed on appeal by the lower Appellate Court, and the smaller house is not in dispute before me. The First Court, however, dismissed the claim with regard to the larger house, and that decree has been affirmed on appeal. The finding of the First Court was that the larger house was not an old one, that it had been built recently, and that the permission of the *zemindars* had not been established. It, however, held that the plaintiffs were estopped from seeking to demolish it. Its findings were that it was difficult to believe that the plaintiffs had not heard of the constructions as they professed. The Court thought that the plaintiffs had more than several opportunities to hear of the constructions, and that they failed to get the news because they did not care to get it, or because their *karindas* wilfully concealed it from them. Under those circumstances it held that the plaintiffs were estopped from seeking its demolition.

The learned District Judge has written a judgment which indicates a vacillating frame of mind. Having referred to the decree of the First Court, he remarks: "I have been taken over the evidence in detail and so far as the main facts are concerned I entirely agree with the lower Court". He then disposes of the defendants' appeal with regard to the smaller house. Dealing with the dispute as regards the larger house, the learned Judge says that he was quite satisfied that *it was built on waste land less than two years ago and without permission.* In the earlier portion of his judgment he had remarked that when the two houses could not be over two years old or perhaps less, it knocked the defence theory and evidence on the head as to the bigger house having been built nine years ago, and with it must go the evidence as to payment of *nazrana* and permission as to the smaller house. Having recorded the finding that there was no permission, he went on to suggest that some *nazrana* might have been paid for the corner house E. G. which was not in dispute, and that it may be that the defendants have been more grasping and have extended their house still further. Later on, however, he remarked, "I am not prepared to entirely ignore the defence story as to payment of *nazrana* "though on the evidence as to the time it is said to have been made it would be difficult to act upon the defence evidence." When he rejected the defence evidence as to the payment of *nazrana* it is impossible to think that he has accepted the fact as proved. In any case that remark must apply to some *nazrana* paid in respect of the house E G.

The real ground on which he has dismissed this claim is, as he puts it, his discretionary powers on equitable grounds, the reasons being

(1) possible injury or loss to either side,

(2) clear indication that for five or six months the house was under construction, and admittedly not a finger was raised, and

(3) the possibility that after all there may be some truth in the defence story, though the evidence must be rejected.

When the learned Judge rejected the defence evidence, his third reason is futile and must be ignored. The substantial ground on which the claim has been dismissed is that of estoppel, namely, that the house was allowed to be built without remonstrance, though the construction took from five to six months.

The main question which I have to decide is whether, if a *raiyat* without the permission of the *zemindar* begins to build upon waste land over which he has no right to build and completes his construction within a few months, the *zemindar* is estopped from recovering possession of the site on the ground that he did not intervene at an earlier stage. In the present case the judgment of the First Court suggests that the *zemindars* do not even live in village and they have been held responsible for the omission of their *pairokars* to report the news to them and their failure to intervene at an earlier stage. If the defendants had no right to build on the land of the *zemindars* no principle of estoppal will come in which would prevent the *zemindars* from recovering possession of the site by demolition of these constructions. If the buildings had been allowed to remain on for a sufficiently long interval to justify an inference that there had been acquiescence on the part of the *zemindar*, their suit might have been dismissed This, however, is not what the learned Judge has found. The dismissal is not based on any subsequent acquiescence, but is based on the failure to intervene during the course of the construction. On this point I am of opinion

that unless it could be established that the defendants were making constructions under some *bona fide* mistake of which the plaintiffs were aware and in spite of their knowledge the plaintiffs deliberately refrained from intervening and thereby led the defendants to believe that they were right in their estimation, there could be no estoppel This was clearly pointed out by their Lordships of the Privy Council in the case of *Beni Ram* v. *Kundan Lal* (1) I may also refer to the case of *Ganga Din Sonar* v. *Jagat Tiwari* (2) where it was laid down that no one can by merely trespassing upon the land of another and constructing costly building on it claim a right to retain possession or to compel the owner to receive compensation for the land. An earlier case namely, *Fatehyab Khan* v. *Muhammad Yusuf* (3) is also in point.

Where the plaintiffs are suing for recovery of proprietary possession of land over which the defendants have taken possession by building a house, there is no discretion in the Court to refuse to grant the relief. On the facts found by the Court below, namely, that the house built by the defendants is a recent one, that it was built on waste land over which they had no right to build, and that it was built without the permission of the *zemindar* the suit ought to have been decreed. I accordingly allow this appeal with costs and modifying the decree of the Court below decree the claim in respect of both the houses as against the contesting defendants Nos. 5 and 6. As the defendants Nos. 1 to 4 pleaded that they had no concern with these constructions, and they never seriously opposed the claim, they would not be made liable to pay costs.

The defendants would be at liberty to remove the materials within three months from this date. In case they fail to do so, the plaintiffs would be entitled to recover possession of the site and the buildings as well.

Z. K. *Appeal dismissed.*

(1) 21 A. 496 at p. 502; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

(2) 25 Ind. Cas. 198; 12 A. L. J. 1026.

(3) 9 A. 434; A. W. N. (1887) 82; 5 Ind. Dec. (N. S.) 725.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL NO. 31 OF 1924.

May 6, 1925.

Present:—Mr. G. N. Misra, A. J. C.

KALKA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM SUCHIT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 32-B (2), 108 (2), 119—Suit for arrears of rent—Determination of rent, prayer for—Suit, nature of—Appeal, forum *of.*

Where a suit is brought for arrears of rent, to which a relief is added for the determination of rent, the suit nevertheless remains a suit for arrears of rent brought under s. 108, cl. (2) of the Oudh Rent Act, the relief with regard to determination of rent being merely ancillary. The appeal in such a suit lies to the District Judge on the Civil Side under s. 119 of the Oudh Rent Act and not to the Commissioner on the Revenue Side. [p. 512, col. 1.]

Deputy Commissioner, Partabgarh, Manager of Baragaon Estate v. *Sheoambar*, 1 O. C. 28 and *Rani Jaibans Kuar* v. *Girdhari Tewari*, 1 O. C. 40, relied on.

Appeal against a decree of the District Judge, Rae Bareli, dated the 17th September 1924, affirming that of the Assistant Collector, First Class, Partabgarh, dated the 27th September 1923.

Mr. *Wasi Hassan*, for the Appellants.

Mr. *Ali Zaheer*, for Respondent No 1.

ORDER.—This appeal arises out of a suit for arrears of rent brought by the plaintiffs-appellants under the following circumstances:—

A certain holding was in possession of the defendant No. 1 as a tenant of one Raja Amarpal Singh *Taluqdar* of Dalippur, who is defendant No. 2 in this case. The rent payable for that holding was a sum of Rs. 25 a year. In the year 1920 the *taluqdar* gave a perpetual lease of the plot in suit to the plaintiffs, the said plot being one of the plots of their lease hold holding. The plaintiffs sued for arrears of rent and added a relief in their suit to the effect that the rent of the plot, which has now been leased to the defendant No. 1, should be determined, and this relief they joined along with their claim for arrears of rent under s. 32-B of the amended Oudh Rent Act.

The learned Assistant Collector threw out the suit on the ground that under s. 32-B the rent could not be determined. The matter was, however, taken in appeal to the learned District Judge of Rae Bareli, who did not go into that question but dismissed the appeal on the preliminary ground that the appeal should have been filed before

the Commissioner on the Revenue Side and that it did not lie to his Court.

I am surprised to see that the learned District Judge, on the view of law which he took, dismissed the appeal. In my opinion the right course for him to take was to return the memorandum of appeal to the plaintiffs-appellants for presentation to the proper Court—*vide* s. 107, sub-s. (2) read with O. VII, r. 10, of the C. P. C. I am not, however, concerned with this order because I do not agree with the view taken by the learned District Judge in appeal. He held that because a suit for determination of rent was one which was brought under s. 108, cl. (3) (*a*), the appeal could not lie to him under s. 119 of the Oudh Rent Act since such a suit was not mentioned in that section as appealable to the District Judge. He, therefore, held that the appeal should have been lodged by the plaintiffs to the Court of the Commissioner on the Revenue Side. I do not agree with that view. In my opinion the suit of the plaintiffs was not principally for determination of rent but it was really a suit for arrears of rent under s. 108, cl. (2), and appeals in suits brought under the latter clause go to the District Judge under s. 119 of the Oudh Rent Act. The learned District Judge seems to think that the principal relief claimed in such a case is the determination of rent. It, however, appears to me that the supposition is not correct in view of sub-s. (3) of s. 32-B of the Oudh Rent Act. That clause says that "a suit for determination of rent under sub-s. (1) or under s. 127 may be joined with a suit for arrears of rent under cl. (2) of s. 108." On a proper interpretation of this sub-s. (3) of s. 32-B, it appears to me clear that the principal suit is the suit for arrears of rent with which the suit for determination of rent is to be joined. In Oudh when suits under s. 127 of the Oudh Rent Act are brought and the plaintiff claims a relief as to the arrears of rent he usually goes in appeal to the Court of the District Judge and then in second appeal to this Court. Any number of reported cases are to be found on this point. I mention only a few of them—*Deputy Commissioner, Pertabgarh, Manager of Baragaon Estate* v. *Sheoambar* (1) and *Rani Jaebans Kuar* v. *Girdhari Tewari* (2).

When a plaintiff brings a suit for arrears of rent and joins a relief with regard to the determination of rent, in my opinion, the suit nevertheless remains a suit for arrears of rent brought under s. 108, cl. (2). The relief with regard to determination of rent is merely ancillary to his getting a decree and if the suit for arrears of rent is one in which an appeal would lie on the Civil Side I fail to see how the *forum* of appeal would be changed merely because in order to get the relief claimed the plaintiff has added in his suit a relief with regard to determination of rent also. For example, if in this case the appellants before me had taken up their appeal to the Court of the Commissioner on the Revenue Side and supposing the Commissioner had determined the rent he could not, it is obvious, have proceeded further in the case because it would not be within his jurisdiction to pass a decree for arrears of rent. The appeal in his Court would have become merely an infructuous proceeding. I am, therefore, of opinion that the decision of the learned District Judge is wrong and that he was fully competent to entertain and decide the appeal brought in his Court by the plaintiffs-appellants.

On behalf of the respondent No. 1, it was contended that the plaintiffs' appeal should be dismissed on the ground that their suit for determination of arrears of rent could not lie under s. 32-B of the Oudh Rent Act. I am afraid I cannot enter into that question. This is a matter for the learned District Judge to decide and it will be perfectly open to the respondent to take up this plea before the District Judge when the case goes back to him for disposal on the merits. At the stage I am only concerned with one question and one question alone, namely, whether the appeal lies to the Court of the District Judge on the Civil Side or to the Court of the Commissioner on the Revenue Side and that question I have already decided as above.

I, therefore, allow this appeal, set aside the order of the District Judge and remand the case to him under O. XLI, r. 23, of the C. P. C. with the directions that he should re-admit the appeal under its original number in the register of appeals and proceed to determine it in accordance with law. The costs in this Court will be costs in the cause.

Z. K. *Appeal allowed.*

(1) 1 O. C. 28.
(2) 1 O. C. 40.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 2121 OF 1923.

March 28, 1924.

Present:—Mr. Justice Fforde.

SOHAN SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Security proceedings—Procedure—Specific charge—Prejudice to accused—Order, whether can be based on suspicion or evidence of general bad character.

Section 110 of the Cr. P. C. provides six categories of cases within one or more of which an offender's case must come in order that a penalty may be imposed upon him in accordance with that section. When a person is sought to be proceeded against under that section it must be made clear as to which sub-section he is charged with coming under. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. The prosecution must charge that he habitually commits one of the crimes referred to in sub-ss. (*a*) to (*d*) inclusive, or that he habitually commits, or attempts to commit or abets the commission of offences involving a breach of the peace, or is so desperate and dangerous as to render his being at large without security hazardous to the community. It must be specifically stated under which of these categories the accused's case is alleged to come. An omission to do so causes serious hardship to the accused inasmuch as he receives no notice of the precise case which he has to meet. In a proceeding under this section the evidence must prove the accused person to come within one or more of the descriptions set out in the section, that is to say, he must be proved to be by habit a robber, house-breaker, thief or forger or by habit a receiver of stolen property knowing the same to have been stolen or that he habitually protects thieves or is the agent or receiver of stolen property and so forth.

An order under s. 110 of the Cr. P. C. cannot be based on general evidence of the accused's bad character and of his association with people of bad character, nor is evidence of general ill repute sufficient to support an order under that section. An order under that section cannot be made upon mere suspicion.

Petition, for revision of the order of the District Magistrate, Sheikhupura, dated the 6th September 1923.

Mr. *B. A. Cooper*, for the Petitioner.

JUDGMENT.—The petitioner in this case has by an order of a Magistrate of the First Class been restricted to the limits of the village Ghazi Munara for a period of two years. The order purports to have been made under the combined provisions of s. 110, Cr. P. C., and the Restriction of Habitual Offenders Punjab Act, 1918.

An appeal from this order was brought to the District Magistrate who confirmed the order of the First Court.

The order of the District Magistrate is now before me upon a petition for revision under s. 439, of the Cr. P. C.

The main ground for revision relied upon by Counsel for the petitioner is that the District Magistrate "has committed a material irregularity in not deciding in which paragraph of s. 110 of the Cr. P. C., the case of the petitioner falls" and, further that the prosecution has failed to prove an offence under that section.

In my opinion the order of the District Magistrate is bad on both these grounds. Section 110 provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with that section. It seems fairly obvious upon general principles that when a person is sought to be proceeded against under this section it must be made clear as to which sub section he is charged with coming under. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. The prosecution must charge that the accused habitually commits one of the crimes referred to in sub-sections (*a*) to (*d*) inclusive, or that he habitually commits, or attempts to commit, or abets the commission of offences involving a breach of the peace [sub-s. (*e*) or is so desperate and dangerous as to render his being at large without security hazardous to the community [sub s. (*f*)] It must be specifically stated under which of these categories the accused's case is alleged to come. That has not been done in the present case, and the omission to do so is obviously a serious hardship to the accused person inasmuch as he receives no notice of the precise case which he has to meet. It is not enough, as in the present case, to charge a person generally of having committed an offence under s. 110, Cr. P. C., without specifically stating under which of the sub-sections the case is alleged to fall.

The evidence moreover must prove the accused person to come within one or more of the descriptions set out in the section, that is to say, he must be proved to be by habit a robber, house-breaker, thief or forger (*a*) and (*d*) or by habit a receiver of stolen property knowing the same to have been stolen (*b*), or that he habitually protects or harbours theives or is the agent or receiver of stolen property (*c*) and so forth. The evidence in the present case does not

come anywhere near providing the necessary proof to justify a conviction under s. 110. In the words of the District Magistrate, "The evidence against the accused in the lower Court was that he was suspected in seven different cases from 1916-1922. The witnesses who depose to these various suspicions are 40. All these witnesses depose to the fact that the accused is a bad character and keeps company with other people of bad character" In other words the entire evidence against the accused is to the effect that he is suspected of having committed various offences, but there is no proof that he has ever been convicted of any offence. In addition to this there is general evidence of the accused's bad character and of his association with people of bad character. This does not bring the case within the provisions of s. 110. Evidence of general ill repute is not sufficient to base an order under s. 110 nor can the accused person be condemned upon suspicion. The order, in my opinion, is clearly bad and should be quashed.

I accordingly accept the revision and set aside the order in question.

Z. K. *Revision accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 49 OF 1925.

April 8, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

DASHRATH—ACCUSED—APPLICANT

versus

TARACHAND—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Dispute relating to immoveable property—Attachment of property—Receiver, appointment of, legality of—Proceedings dropped after attachment—Disposal of property, whether legal—Procedure.

Although a Magistrate has power in a case of emergency to attach property which is the subject of dispute in proceedings under s. 145 of the Cr. P. C., he has no power to appoint a Receiver under that section, and an order appointing a Receiver under that section is *ultra vires* and illegal. [p. 515, col. 1.]

Subadramma v. *Satyam Swami*, 7 Ind. Cas. 895; 8 M. L. T. 314; 11 Cr. L. J. 536; (1910) M. W. N. 821 and *Mewa Lal* v. *Emperor*, 44 Ind. Cas. 41; 3 P. L. J. 147; (1918) Pat. 363; 19 Cr. L. J. 249; 4 P. L. W. 359, followed.

It is, however, competent to him in his administrative capacity to appoint some person to manage on his behalf the property so attached and that too subject to his control and supervision. The person so appointed is in no sense a Receiver but merely a servant of the Magistrate and has no powers which a Receiver appointed under s. 146 (2) of the Code can exercise. [p. 515, col. 2.]

If after attachment of the property under s. 145, Cr. P. C., the proceedings are dropped as the Magistrate comes to the conclusion that there is no likelihood of a breach of the peace, he has no jurisdiction to direct that the attached property should be delivered to one of the parties to the proceedings, as the effect of such an order would be to decide the question at issue between the parties. In such a case the proper order is to direct that the property should remain in his custody and management pending the decision of a Civil Court on the question of title. [*ibid.*]

Ali Muhammad Mandal v. *Piggot*, 60 Ind. Cas. 325; 48 C. 522; 32 C. L. J. 270; 22 Cr. L. J. 213, and *Chenga Reddi* v. *Ramasamy Goundan*, 27 Ind. Cas. 152; 16 Cr. L. J. 104; 1 L. W. 1032.

Criminal revision against the order of the First Class Magistrate, Khandwa, dated the 26th January 1925, in Criminal Case No. 59/30 of 1924.

Mr. *M. Gupta*, for the Applicant.

Mr. *M. B. Kinkhede*, R. B., and Mr. *R. R. Jaiwant*, for the Non-Applicant.

ORDER.—On information laid by the Sub-Inspector of Police, Khandwa, to the effect that there was a dispute between the non-applicant Tarachand and *Musammat* Ghissibai on the one hand and the applicant Dashrath and Mansaram on the other regarding a house in the town of Khandwa, and that a breach of peace was apprehended, proceedings were started under s. 145, Cr. P. C., by Mr. Guru, First Class Magistrate, Khandwa. The Magistrate attached the house under the second proviso to cl. (4) of s. 145 of the Cr. P. C., as he anticipated some trouble and appointed one Binjraj Receiver of the attached property. The parties objected to the appointment of a Receiver but the Magistrate overruled their objection and appointed Rai Sahib Amarchand as Receiver in place of Binjraj. After recording evidence of both the parties he came to the conclusion that there was no satisfactory and reliable evidence to prove that a breach of peace was either intended or attempted by any of the parties or that there was a likelihood of any breach of peace. He was of opinion that the real object of the parties was to avoid civil litigation and to fortify themselves under s. 145, Cr. P. C., against the civil litigation that might arise in future between them in respect of the house in dispute. He, therefore, cancelled his preliminary order and dropped the proceedings. After doing so he made the following order:—

"It is clear from the statement of the S H O (Station House Officer) that the inner locks to this house were opened by the keys of Tarachand and that he was in possession of it when the Police took the house under it (?) I can, therefore, do nothing else but to restore this house (and its articles) to him. He is, hereby ordered to take it in his possession."

It is against this order that Dashrath has filed this petition.

It has been held that although a Magistrate has power in case of emergency to attach the property which is the subject of dispute in proceedings under s. 145, he has no power to appoint a Receiver under s. 145 (1), Cr. P. C., and the order appointing a Receiver under that section is *ultra vires* and illegal. In *Subadramma* v *Satyam Swami* (1) Mr. Justice Ayling, has observed: –

"The appointment of a Receiver, however, appears to be *ultra vires*. The only section authorising such a step is cl. (2) of s. 146. Section 146 authorises attachment in certain cases after conclusion of the possession enquiry and there is no such attachment here. I cannot accept the suggestion of respondent's Vakil that this cl. (2) is intended to apply to attachments under the preceding section also. If it were so, it would have been put in the shape of a separate section instead of a mere clause of s. 146.

The appointment of a Receiver must, therefore, be set aside as *ultra vires*, the attachment being affirmed."

Similarly in *Mewa Lal* v. *Emperor* (2) it has been held that although under s. 145 of the Cr. P. C. a Magistrate has in cases of emergency the power to attach the subject in dispute, but he has no power at that stage to appoint a Receiver.

It is no doubt true that the object of effecting an attachment under s. 145, Cr. P. C, in cases of emergency is to prevent a breach of the peace. The attachment is not effected merely to serve as a restraint on alienation as is done in civil cases. In order to prevent a breach of the peace, it may be necessary for the Magistrate to take possession of the attached property and manage it during the pendency of the proceedings. For this purpose it is quite competent to him in his administrative capacity or in exercise of his inherent jurisdiction to appoint some person to manage the property on his behalf and subject to his control and supervision. The person so appointed is, however, in no sense a Receiver but merely a servant of the Magistrate, *e.g.*, he has no powers which a Receiver appointed under s. 146 (2) can exercise. He has simply an authority to take possession of the attached property and manage it on behalf of the Magistrate. I am, therefore, of opinion that the order of the Magistrate in appointing a Receiver under s. 145 was illegal and *ultra vires*.

I am further of opinion that where a Magistrate attaches in cases of emergency the property which is the subject of dispute under s. 145, Cr. P. C., and after recording evidence adduced by the parties to the proceeding comes to the conclusion that there is no danger of a breach of the peace, and on that ground files the proceeding he has no jurisdiction to direct that the attached property should be delivered to one of the parties to the proceeding, as the effect of such an order would be to decide the question at issue between the parties. In such a case the proper order is to direct that the property should remain in his custody and management pending decision of a Civil Court on the question of title. Such was the order made in similar circumstances in *Ali Muhammad Mandal* v. *Piggot* (3) and *Chenga Reddi* v. *Ramasamy Goundan* (4).

The order complained against is set aside and it is hereby directed that the Magistrate do retain the attached property in his custody and management until the question of title to the said property is decided in a Civil Court.

G. R. D. *Order set aside.*

Z. K.

(1) 7 Ind. Cas. 895; 8 M. L. T. 314; 11 Cr. L. J. 536; (1910) M. W. N. 821.

(2) 44 Ind. Cas. 41; 3 P. L. J. 147; (1917) Pat. 363; 19 Cr. L. J. 249; 4 P. L. W. 359.

(3) 60 Ind. Cas. 325; 48 C. 522; 32 C. L. J. 270; 22 Cr. L. J 213.

(4) 27 Ind. Cas. 152; 16 Cr. L. J. 101; 1 L. W. 1032.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1650 OF 1923.

February 16, 1924.

Present:—Mr. Justice Martineau.

THAKAR SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 423—Appeal, dismissal of—Judgment, contents of.

Where an appeal is dismissed under s. 423 of the Cr. P. C., the Appellate Court is bound to write a judgment stating the points for determination and the reasons for its decision.

Petition, under s. 439, Cr. P. C., for the revision of an order of the Additional District Magistrate, Lahore, dated the 8th January 1923.

JUDGMENT.—An order under s. 7 of Act V of 1918 was passed against one Thakar Singh by Mr. Keough, Sub-Divisional Magistrate of Kasur and Thakar Singh's appeal was dismissed by the Additional District Magistrate on the 8th January 1923. Thakar Singh applied for revision to this Court and I accepted the application and ordered that the appeal should be disposed of afresh on the ground that it had been decided by Mr. Keough, who was not competent to hear an appeal from his own order. The learned Government Advocate has now moved for a review of my order as the Officer who decided the appeal was in fact not Mr. Keough but Khan Bahadur Nawab Muzaffar Khan.

The mistake was due to the fact that in the copy of the Appellate Court's judgment filed with the application for revision. Mr. Keough was wrongly shown as the officer who had decided the appeal.

Although, however, the appeal was not heard by Mr. Keough as I had supposed, the application for revision would nevertheless have had to be accepted on the ground that there had been no proper decision of the appeal. The order of the Additional District Magistrate was in the following terms:—Appellant absent. Waited till 12 noon. I see no reason to interfere with the judgment of the lower Court. Even if the appeal had been summarily dismissed under s. 421 of the Cr. P. C. such an order would *hardly* have been *sufficient* seeing that it affords no indication that the appellant's Vakil who was present was given a hearing but rather suggests that the Additional District Magistrate did not consider the appeal on its merits but dismissed it on account of the appellant's absence.

But as a matter of fact it appears from the record that the appeal which had been filed on the 18th August 1922 and was adjourned several times before it was dismissed was not summarily dismissed under s. 421 but was dismissed under s. 423 and, tharefore, the Additional District Magistrate was bound to write a judgment stating the points for determination and the reasons for his decision which he did not do.

I accordingly dismiss the present application and maintain my order of the 29th November last directing a re-hearing of the appeal not for the reason given therein but on the ground that the appeal has not been disposed of in the manner required by law.

Z. K. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 26-B OF 1925.

April 6, 1925.

Present:—Mr. Wadegaonkar, A. J. C.

RAGHUNATH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Circumstantial evidence, conviction when can be based on—Possession of property stolen from deceased—Presumption—Evidence Act (I of 1872), s. 30—Confession of co-accused, admissibility of—Statement made before Committing Magistrate retracted at trial, value of.

In cases depending entirely on circumstantial evidence, in order to justify an inference of guilt, the incriminating facts found against the accused must be incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [p. 517, col. 2.]

Emperor v. *Imam Ali Sircar*, 8 C. W. N. 278; 1 Cr. L. J. 124. and *Emperor* v. *Kangal Mali*, 26 Ind. Cas. 161; 41 C. 601; 15 Cr. L. J. 712.

Section 30 of the Evidence Act contemplates a statement which taken by itself would be sufficient to justify the conviction of the person making it for the offence for which he is being jointly tried with the other person or persons against whom it is tendered. An exculpatory statement in which the accused tries to throw the guilt on the shoulders of his co-accused cannot be used against them. [p 519, col. 2.]

Empress of India v. *Ganraj*, 2 A. 444 at p. 446; 4 Ind. Jur 581; 1 Ind. Dec. (N. S.) 851, relied on.

Under s. 30 of the Evidence Act no probative value can be attached to a statement of an accused made

before the Committing Magistrate but retracted before the Sessions, in considering the guilt of his co-accused. [*ibid.*]

Where the only evidence against an accused person is that he produced certain property which is identified as having been stolen from a person proved to have been murdered and there is no admissible evidence against him to connect him more directly with the murder, it is unsafe to convict him of the offence of murder. [p. 520, col. 2.]

Empress v. *Parbati*, A. W. N. (1887) 130, *Queen-Empress* v. *Ram Saran*, 8 A. 306; A. W. N. (1885) 311; 4 Ind. Dec. (N. S.) 1028, distinguished.

Appeal against the judgment of the Sessions Judge, Akola, dated the 9th February 1925, in Sessions Trial No. 13 of 1924.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—Moti and Narhari were committed to the Sessions Court, Akola, for trial on a charge under s. 302, Indian Penal Code, of having murdered Sadasukh Marwadi at Khamgaon. They were tried by the Sessions Judge, Akola, with the help of three Assessors all of whom gave their opinion that Raghunath and Moti were guilty of the murder of Sadasukh and that no case had been made out against Narhari by the prosecution. The learned Sessions Judge agreed with their opinion, acquitted Narhari and convicted Raghunath and Moti under s. 302, Indian Penal Code, and sentenced them both to transportation for life. Against this conviction and sentence Raghunath and Moti have filed two separate appeals.

The first question for consideration is whether the prosecution has succeeded in establishing that Sadasukh was murdered. It appears from the evidence of P. W. No. 13, Ramchandra Rangari, that on 13th October 1914 he saw a gunny bag containing something floating on the surface of the water of the well in Survey No. 11 situated in *Mouza* Januna. That well is about half a mile from the town of Khamgaon where the deceased used to reside. As the appearance of the bag was highly suspicious, Ramchandra immediately reported the matter to the Police who forthwith went to the scene and got the bag taken out of the well. The bag was torn open and was found to contain a dead body of an old man in a sitting posture. The body had been placed on a piece of cloth with four stones under it and on the head of the body there was another piece of cloth with three stones placed over it. A rope with a double knot had been tied very tightly round the neck of the deceased. Some *hundis*, bonds, chits and a few clothes were also found along with the dead body in the bag. The body was in a decomposed state and was badly stinking. Inquest was held when several persons identified the dead body to be that of Sadasukh Marwadi who used to reside at the house of accused Raghunath in Khamgaon. The body was then sent to the mortuary at Khamgaon for *post mortem* examination. The Sub-Assistant Surgeon, Khamgaon, who was one of the *panches* at the inquest conducted the *post mortem* examination of that body. He was examined by the Committing Magistrate and also before the Sessions Judge as P. W. No. 15 and his evidence leaves absolutely no room for doubt that the death of the deceased was due to foul play. He deposes that the rope tied round the neck of the deceased had a double knot and adds "A person wishing to commit suicide by strangulation can give one knot to the rope tied round his neck. But he cannot give a second knot, as the tightening of the rope caused by the first knot makes him unconscious on account of the pressure on the vital structures of the neck and leaves him no strength to give the second knot." In other words according to him the double knotted ligature round the neck of the deceased was a clear indication of the fact that his death had been caused by strangulation by some person other than himself. This evidence which I see no reason to disbelieve coupled with the circumstances in which the dead body was found conclusively proves that the deceased was murdered.

The next question is whether the prosecution has succeeded in establishing that the appellants were the persons who murdered the deceased. Out of the 20 witnesses examined by the prosecution in this case not one is an eye-witness to the actual murder. The case depends entirely on circumstantial evidence. In cases of such a nature, in order to justify the inference of guilt, the incriminating facts found against the prisoners must be incompatible with their innocence and incapable of explanation upon any other reasonable hypothesis than that of their guilt: *Emperor* v. *Imam Ali Sircar* (1), *Emperor* v *Kangal Mali* (2). It is, therefore, necessary to consider whether the circumstantial evidence adduced in this case conclusively proves the guilt of the appellants.

(1) 8 C. W. N. 278: 1 Cr. L. J. 124.
(2) 26 Ind. Cas. 161; 41 C. 601; 15 Cr. L. J. 713.

It has been amply proved that the deceased before he disappeared used to live at the house of appellant Raghunath and dine with him on payment of 0-8 0 per day. He had disappeared from Raghunath's house some days prior to the discovery of his dead body in the well at Januna and as Raghunath had made no report to the Police about the disappearance of the deceased and as he could give no satisfactory explanation of the sudden disappearance of the deceased, suspicion naturally fell upon him and the Police induced one Nathooram (P. W. No. 9) who was on fairly intimate terms with Raghunath to make enquiries from the latter. Nathooram accordingly approached Raghunath and asked him whether he had murdered Sadasukh and thrown his body into the well in Survey No. 11 of Januna. Raghunath at first denied all knowledge of the affair but when pressed hard to tell the truth, he admitted to Nathooram that he had murdered the deceased saying * * * (this act has been done by me). Nathooram communicated this information to the Police and thereupon Raghunath was taken to the Circle Inspector, Khamgaon. The latter questioned Raghunath who told him the details of the whole story and admitted to him that he had the property of the deceased with him and agreed to produce it. He then led the Police and *panches* to the temple of the Sati which is quite close to his house and is separated from it by a small lane. He took them to the north east corner of the compound of the temple and from that spot he unearthed a *lota* (article B) containing some ingots of gold and silver and some gold *kadas* and two pieces of a broken gold *hasli*. The value of the property so recovered was about Rs. 2,500.

The Police had come to know during their investigation that the deceased Sadasukh was possessed of many gold ornaments and sovereigns. Accused, Raghunath took out the ornaments but no sovereigns and so he was asked what had become of the sovereigns. At first he hesitated but later on promised to produce the sovereigns also. He then took the Police and *panches* to his house and from the northern room of his house where cotton had been stacked in bags, he took out a *kasni* from one of the bags. The *kasni* when emptied was found to contain 86 sovereigns (article L). He was then questioned as to what had become of the other sovereigns. He told the Police that he had given some sovereigns to accused Moti. Thereupon the party proceeded to the factory of Moti's *malik* which was close by and where Moti was sleeping and called upon him to produce the property which had been given to him by Raghunath. Moti was not prepared for this surprise which was suddenly sprung upon him. He is said to have exhibited some nervousness for a second or so but ultimately agreed to produce the property. He led the party to the compound of his *malik's* factory where he was sleeping, and removing a bamboo post of a *mandwa*, he took out from inside the hole a small bundle containing a gold bar weighing 26 *tolas* 8 *masas*, 2 pieces of a gold bar weighing 6 *tolas* 1 *masa* and a piece of gold *hasli* (articles N, O and P). He was then asked what had become of the sovereigns given to him by Raghunath. In reply he told the Police that the 8 sovereigns which Raghunath had given to him had been changed into rupees at the shop of a *saraf* and that the rupees had been paid to Raghunath. That *saraf* is (P. W. No. 2) Mathuradas whose evidence read with the evidence of (P. W. No. 3) proves that accused Moti had taken 8 sovereigns about 2 or 3 days before his arrest to Mathuradas' shop for being cashed and got Rs. 120 in exchange.

In short, property worth more than Rs. 5,000 in the shape of gold and silver bars and gold ornaments and sovereigns was recovered from the possession of the appellants by the Police. The appellants are too poor to own property of so much value nor is it their case that all the property which they so produced is their property. On the other hand Moti states that the property which he produced before the Police was given to him by accused Raghunath though he is unable to say how Raghunath got it. Raghunath admitted both in his preliminary statement and in his examination in the Sessions Court that the property produced by Moti before the Police was given by him to Moti; but while he admitted in his preliminary statement that the property which Moti produced before the Police was out of Sadasukh's murder, he stated in the Sessions Court that the property given to Moti by him was his own property. I have no doubt that his subsequent statement is a pure invention and I hold on the strength of his first statement that the property, which he gave to Moti and which Moti pro-

duced before the Police, was the property of the deceased Sadasukh.

I have already stated that Raghunath produced property before the Police from two places, that is a *lota* containing gold bars and ornaments, etc. of the value of Rs. 2,500 or so from the compound of Sati's temple and 85 sovereigns from cotton bag kept in a room of his house. In his preliminary statement made before the Committing Magistrate (P 21,) Raghunath clearly admitted that the property which he produced before the Police from both the places referred to above belonged to deceased Sadasukh. But in the Sessions Court while he admitted having produced 86 sovereigns before the Police from a room of his house, he denied having produced any property from the compound of Sati's temple and stated that the Police took him to Sati's temple and pointing to him a spot in the compound of that temple asked him to dig there and that from that place a *lota*, containing gold bars and ornaments, was recovered. He stated that he did not know to whom the *lota* and its contents belonged. He alleged that the sovereigns, which he produced from a cotton bag in his house were his own property. I have no doubt that his statement in the Sessions Court is a pure fabrication and his preliminary statement before the Committing Magistrate in regard the production of property, which has been amply corroborated by the evidence adduced by the prosecution in this case leaves absolutely no room for doubt that he produced property before the Police from two places and that the so produced was the property of deceased Sadasukh as admitted him in his preliminary statement

So far as appellant Raghunath is concerned the following facts have been clearly proved against him :—

(*a*) that the deceased Sadasukh used to live at Raghunath's house until he disappeared;

(*b*) that Raghunath made no report about the sudden disappearance of the deceased to the Police or to anybody else;

(*c*) that within a few days after the disappearance of the deceased his dead body was found in a well in Januna, which is about half a mile from the house of appellant Raghunath;

(*d*) that shortly after the recovery of the dead body appellant Raghunath admitted to Nathooram that he had murdered the deceased;

(*e*) that after this confession Raghunath produced from two places considerable valuable property worth about Rs. 4,000 belonging to and in the possession of the deceased until his death.

All these facts taken together conclusively prove that appellant Raghunath murdered the deceased for the sake of his property. He was rightly convicted and I dismiss his appeal.

The case of appellant Moti, however, stands on an entirely different footing. The only fact which the prosecution has been able to prove against him is that he was found in possession of some property said to belong to the deceased. It is urged that this fact read along with the preliminary statement made by accused Raghunath (P 21) is sufficient to justify Moti's conviction for the murder of the deceased Sadasukh The preliminary statement of accused Raghunath which is sought to be used against Moti is an exculpatory statement in which Raghunath has tried to throw the entire blame upon Moti and Narhari. He has stated therein that Moti and Narhari committed the murder of the deceased and that he simply witnessed it and had no hand in it. Such a statement does not come within the purview of s. 30 of the Evidence Act. That section contemplates a statement, which taken by itself, is sufficient to justify the conviction of the person making it for the offence for which he is being jointly tried with the other person or persons against whom it is tendered. As observed by Straight, J., in *Empress of India* v. *Ginraj* (3) the confessing prisoner must tar himself and the person or persons whom he implicated with one and the same brush. Moreover, this statement was retracted by Raghunath in the Sessions Court and no probative value can be attached to it in considering the guilt of accused Moti.

It has no doubt been held in two cases, *viz.*, *Queen-Empress* v. *Sami* (4) and *Public Prosecutor* v. *Chiareddi Munayya* (5) that in cases in which murder and robbery have been shown to form parts of one transaction, recent and unexplained possession of stolen property in the absence of circumstances tending to show that the accused was only the receiver of the property, would not only

(3) 2 A. 444; 4 Ind. Jur. 581; 1 Ind. Dec. (N. S.) 851.
(4) 13 M. 426; 1 Weir 290; 4 Ind. Dec. (N. S.) 1009.
(5) 12 Ind. Cas. 652; 21 M. L. J. 1071; (1911) 2 M. W. N. 478; 12 Cr. L. J. 564.

be presumptive evidence against the prisoner on the charge of robbery but also on the charge of murder. In both the above cases, there was other circumstantial evidence besides possession of stolen property against the prisoners to connect them more or less directly with the murder, but in the present case, however, there is not an iota of admissible and legal evidence connecting Moti which the offence charged against him except possession of some property. The prosecution has not even shown that Moti was on visiting terms with the deceased, or that he used to visit the house of Raghunath, or that he and Raghunath were seen talking together before the disappearance of the deceased or that the deceased was last seen alive in their company, or that they were seen near the well where the body of the deceased was found about the time of the disappearance of the deceased. In the absence of any such evidence or evidence of a similar nature connecting Moti with the murder of the deceased it would be extremely unsafe to convict him of the principal crime of murder on the sole ground that he was found in possession of some property belonging to the deceased. The property found in his possession has not been identified by independent witnesses as being the property of the deceased. In fact the property found in his possession is not capable of identification. We have only the preliminary statement of Raghunath before us which shows that the property found with Moti was the property of the deceased. That statement though admissible in evidence as against Raghunath has no evidentiary value as against Moti.

I shall, however, assume that the property recovered by Moti was the property of the deceased as stated by accused Raghunath in his preliminary statement. Even then in the absence of other circumstantial evidence directly connecting Moti with the crime of murder, I am not prepared to uphold his conviction on the sole ground that he was found in possession of some property belonging to the deceased. In the case of *Empress* v. *Parbati* (6), Straight, J., following the decision in *Queen-Empress* v *Ram Saran* (7) has observed "I do not mean to say that such possession is no evidence against the person, or that when taken in conjunction with other independence circumstances, it may not be of great importance and value in determining the guilt of the person who is found in such possession of the principal crime of murder. But I think that, *standing by itself*, it would, for the reasons I have given in that case to which I have already referred, be an unsafe and dangerous inference to draw from the mere possession of property stolen from a person recently murdered, that the person in possession of such property must necessarily have been concerned in the murder. It is most undoubtedly material from and upon which a Court may reasonably hold the person guilty of having stolen the articles or of receiving them knowing them to have been stolen. But as I have already remarked, it requires a very long and dangerous leap to jump to the conclusion that the possession of the property, *standing by itself*, is necessarily adequate proof of participation in a murder. Therefore, I do not think that the possession of the stolen property in this case was a material which, *without other matters to fortify it*, was of such a character as to justify the learned Judge in drawing the inference which he did." I respectfully agree with these observations and hold that where the only evidence against an accused person is that he produced certain property which is identified as having been stolen from a person proved to have been murdered and there is no admissible evidence against him to connect him more directly with the murder, it is unsafe to convict him of the offence of murder. I accordingly set aside the conviction and sentence passed on Moti and direct that he be acquitted and set at liberty.

Z. K. *Conviction and sentence set aside.*

(6) A. W. N. (1887) 130.
(7) 8 A. 305; A. W. N. (1885) 311; 4 Ind. Dec. (N. S.) 1028.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 178 OF 1925.

May 20, 1925.

Present:—Mr. Justice Mukerji.

NARAIN DUTT TEWARI—APPLICANT

versus

RUDRA DUTT BHATT AND ANOTHER—OPPOSITE PARTIES.

Penal Code (Act XLV of 1860), s. 477-A—Falsification of accounts—Wrongful gain—Falsification for purpose of obtaining money actually due—Offence.

Accused falsified the account books of a Bank with a view to obtain money which was due to him from the Bank but wh ch could not be obtained at once and in a fair manner and which under certain circumstances may not have been possible to obtain in full:

Held, that the accused was guilty of an offence under s. 477-A of the Penal Code

Queen-Empress v. *Muhammad Saeed Khan*, 21 A. 113; A. W. N. (1898) 197; 9 Ind. Dec. (N. S.) 781, followed.

Criminal reference made by the District Magistrate, Almora, dated the 18th of March 1925.

Dr. *M. L. Agarwala*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Sir Dr. *Tej Bahadur Sapru*, Messrs. *Hamid Hasan* and *P. N. Sapru*, for the Opposite Parties.

JUDGMENT.—This is a criminal case on the Revision Side of this Court. The Court took action of its own accord and sent for the record of the case.

It appears that the opposite parties Rudra Dutt Bhat and Gauri Dutt Karnatak were two accused persons who were called before a Magistrate to answer charges under ss. 423 and 477A of the Indian Penal Code at the instance of one Narayan Dutt Tewary. The learned Magistrate in a judgment in which he stated the facts and the evidence very clearly came to the conclusion that on the facts found by him no offence under either of the sections had been made out. He accordingly discharged the accused persons. Narayan Dutt Tewary took the matter to the District Magistrate and while the case was still before him this Court sent for the record. The Magistrate, in sending for the record, recorded his opinion that there was no case made out under s. 423 of the Indian Penal Code, but there was enough material before the learned Trying Magistrate on which he could and should have framed a charge under s. 477A of the Indian Penal Code.

The case has been very ably argued on either side and the question for determination is whether on the facts found, the accused persons were entitled to a discharge or whether a charge should have been framed and the case tried either by the Magistrate himself or committed to the Court of Session. As in my view the order of discharge was not warranted by the statement of the law, I will briefly state the facts as found by the Magistrate, without expressing any opinion whatsoever as to whether the facts should be finally accepted or not as correct. It will be for the Court which finally tries the opposite parties to come to conclusions of facts on hearing such evidence as may be adduced on behalf of the defence. The accused persons, I understand, have already been examined by the learned Magistrate.

The Punjab Industrial Bank opened a branch at Almora some time in August 1922 and it closed its doors on or about the 6th of March 1924. The complainant Narain Dutt was appointed the cashier on making a deposit as security of a sum of Rs. 5,000. This money was to bear certain interest, and was re-payable on the expiry of 12 months unless of course a fresh contract as to security was entered into. Similarly Gauri Dutt, one of the opposite parties, was appointed an accountant and he deposited a sum of Rs. 1,000 for a period of six months. His appointment was made some time in July 1923 and the money deposited by him was re-payable some time in January 1924. The opposite party Rudra Dutt, as the manager of the local branch, made a deposit of a sum of Rs. 2,000 for a period of 12 months. He was appointed in May 1922. In spite of his repeated offer to resign and request to be relieved he was obliged to continue in office up to some time in January 1924. Narain Dutt Tewari on the expiry of the six months for which he had made the deposit brought a suit against the Bank for recovery of his money and obtained a decree In execution of it he caused the attachment of certain securities (promissory notes) held by the local branch of the Bank and then it was discovered that the securities had been transferred. It is this transfer and the method by which it was done which forms the subject-matter of Narain Dutt's complaint.

It appears that there was a firm trading at Almora under the name and style of J. Bhatt and Sons and Rudra Dutt, one of the opposite parties, was interested in that firm. On the 22nd of December 1923 an entry was made in the books of the Bank showing that J. Bhatt and Sons made a deposit of a sum of Rs. 1,000 in the Bank. On the same date a debit entry was made against Gauri Dutt showing that he borrowed a sum of Rs. 1,000 from the Bank and gave by way of security a promissory note executed by himself and his father. On the same date

promissory notes held by the Bank to the value of nearly Rs. 1,000 were sold to J. Bhatt and Sons and they transferred the same to Gauri Dutt. It has been found by the Magistrate that as a matter of fact no payment in cash or kind was made by J. Bhatt and Sons into the Bank. It has been found by the Magistarte that the whole arrangement was really a fictitious transaction and the real transaction was this. The deposit made by Gauri Dutt was repayable to him on the 17th of January 1924. The doors of the Bank might be closed on any day, it being in such a tottering condition. Gauri Dutt and his father gave the promissory note as against the deposit and in the meantime got back their money in the shape of promissory notes.

On these findings, briefly stated, the question that the learned Magistrate had to decide was whether there was an intention to defraud the Bank within the meaning of s. 477-A of the Indian Penal Code. It has been conceded before me and it was conceded before the learned District Magistrate that s. 423 of the Indian Penal Code was probably not applicable. The question is as to the applicability of s. 477-A. That the account books were falsified admits of no doubt. If an intention to defraud is established there would be a case apparently established against the opposite parties so as to justify further proceedings.

Sir Tej Bahadur Sapru with his usual lucidity and clearness has put the entire case of his clients before me. He argued that the opposite parties had not the slightest interest to injure the Bank or any creditors of the Bank to the extent of a single pie. All that they were anxious for was to secure their own money which was going to be justly due to Gauri Dutt. The Bank was still operating though in a very unsatisfactory condition. No undue advantage was taken and only a legitimate claim was satisfied. He pointed out that the District Magistrate himself expressed an opinion on the point as follows:—

"The extent to which others would be defrauded is no doubt somewhat nebulous and uncertain."

Sir Tej Bahadur argued that if in the course of liquidation (the Bank has already probably gone into liquidation) it transpired that the circumstances in which the Bank was situated Gauri Dutt was not entitled as a creditor of the Bank to the entire amount of his deposit there would be civil liability against him and he could be made to disgorge the whole or a part of the money taken by him under proceedings taken in liquidation. He cited several cases, English and Indian.

I have given my best consideration to all arguments and have examined the various cases cited. In my opinion, which I wish to state briefly for reasons already given, *viz.*, the case will have to be retried, there is enough material on the record for directing a further enquiry. Some of the facts as found by the Magistrate have been disputed by the opposite parties and it has been expressly stated that there were material documents in the opposite parties' hands which would establish their innocence conclusively. In the circumstances, I will briefly indicate whether in my opinion a case under s. 477-A could be held as proved on the facts found by the Magistrate.

As already stated, falsification of account is admitted. It has been established that J. Bhatt and Sons never made a deposit of Rs. 1,000 and were, therefore, not entitled to purchase any securities of the Bank. The whole arrangement was one by which Gauri Dutt obtained securities worth his deposit without the higher authorities of the Bank being aware of the fact. The sole question, therefore, is whether in the method adopted there was or was not an intent to defraud. That the falsity of the account was made to deceive the Bank authorities and the officers of the Court in case of liquidation admits of no doubt. If together with the intention of deceiving there be an attempt to obtain an undue advantage there would be in law an intent to defraud. The case of *Queen-Empress* v. *Muhammad Saeed Khan* (1) decided in this Court as long back as in 1898, is in point. Banerji, J., quoted from Sir James Fitz James Stephen's History of the Criminal Law of England, Vol. II, p. 121, and held in the case before him that whether the wider or the narrower construction adopted by different Courts were adopted, the intention to defraud was established in the case before him. In that case a Police Head Constable had removed adverse remarks from his service roll and

(1) 21 A. 113; A. W. N. (1893) 197; 9 Ind. Dec. (N. S.) 781.

fabricated favourable remarks. It was found that the object of Said Khan was to obtain an advantage to himself by way of advancement in service which he was not likely to gain if the adverse remarks were left on the record. I have no doubt that the interpretation put by Banerji, J. was a proper interpretation to put on the word fraud and various expressions involving the word as used in the Indian Penal Code. In this case the intention was to obtain an advantage which could not be obtained at once in a fair manner. The Bank might fail any day and it might take years to recover the money. Then the Bank might not be able to pay its debts to the fullest extent and some of the money deposited might not be realised at all. The mere fact that a sum of Rs. 1,000 was going to fall due shortly was really immaterial. The points urged by Sir Tej Bahadur are really matters that go to extenuate the seriousness of the offence, and I have no doubt that they would be considered (if there be a conviction) when sentence is passed.

I hold that the order of discharge was not justified and I send back the record to the District Magistrate of Almora with the direction that it be sent down to the Magistrate who tried the case and in the case of his transfer to some other Magistrate for further enquiry.

Z. K. *Case remanded; Further enquiry ordered.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 30-B OF 1925.

April 15, 1925.

Present:—Mr. Findlay, Offg. J. C.

ISMAIL PANJU—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 467, 471—Forgery—Using forged document as genuine—Conviction for separate offences, legality of—Interpretation of Statutes—Penal Statute—Benefit of doubt.

A penal Statute should be construed in a strict and narrow sense and no violence must be done to the language in order to bring people within it but rather care must be taken that no one is brought within it who is not within its strict language. [p. 525, col. 1.]

London County Council v. *Aylesbury Co.*, (1898) 1 Q. B. 106; 61 J. P. 759; 67 L. J. Q. B. 24; 77 L. T. 440, followed.

Where in a penal Statute an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself properly and clearly. [p. 525, cols. 1 & 2.]

Hull Dock Co. v. *Browne*, (1831) 36 R. R. 459; 2 B. & Ad. 43; 109 E. R. 1059, followed.

The reason for the presence of s. 471 of the Penal Code on the Statute book in the somewhat unusual language which is employed therein, is in order to provide a useful alternative charge in cases where there is uncertainty as to whether the person on trial is himself the forger of the document, or has merely used it as genuine, knowing it to be nothing of the sort. The section is directed against persons other than the forger himself. [p. 524, col. 2.]

A person who has been convicted under s. 467 of the Penal Code of forgery of a document cannot also be convicted under s. 471 of using it as genuine. [p. 525, col. 1.]

Appeal against the judgment of the Sessions Judge, Amraoti, dated the 19th February 1925, in Sessions Case No. 18 of 1924.

Sir Dr. *H. S. Gour*, for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The appellant Ismail Panju has been convicted by the Sessions Judge, Amraoti, of an offence under s. 471 read with s. 467, Indian Penal Code, and sentenced to 18 months' rigorous imprisonment. This sentence has been ordered to run consecutively with the previous sentence passed on the same appellant in Session Case No. 18 of 1924 on the 12th of January 1925. In that case the present appellant was convicted of abetment and forgery under s. 467/109, Indian Penal Code, and sentenced to two years' rigorous imprisonment and to a fine of Rs. 1,000. On appeal to this Court my predecessor, in his judgment, dated the 7th of February 1925, dismissed the said appeal.

As is apparent from the judgment of the learned Sessions Judge, the present appellant was put on his trial separately in respect of the offence under s. 471, Indian Penal Code, that is, of using the forged *kabuliyats* by producing them in Civil Suit No. 139 of 1923. It is now common ground, however, that the appellant did produce these *kabuliyats* in Court and I am now only concerned with the question of whether the present appellant was rightly convicted of the independent offence under s. 471 read with s. 467 in spite of his previous conviction under s. 467/109 in respect of the same documents.

The law applicable has been discussed to some extent in para. 8 of the judgment

appealed against. Abdul Rahim, J., of the Madras High Court in Criminal Appeal No. 605 of 1915, decided on the 15th of December 1915, held that the forger of an instrument, although convicted under s. 467, could further be convicted of the offence under s. 471, Indian Penal Code, *cf. In re, Madu Chinnagi Reddi* (1). The learned Justices Abdul Rahim and Phillips there differed from the view taken by Aikman, J., in *Qneen Empress* v. *Umrao Lal* (2), a case which will subsequently be referred to. In *Gajaman Sakharam* v. *Emperor* (3) Hallifax, A. J. C., also considered this question and decided that there was nothing to prevent a forger from being convicted both of forgery and of using as genuine the forged document. The learned Additional Judicial Commissioner remarked there as follows:—

"The appellant has been convicted of abetting the forgery of a power-of-attorney and also of the abetment of the commission of forgery with intent to cheat, and has been sentenced to concurrent period of five years' rigorous imprisonment for each offence. But he has been acquitted of the charge of abetting the use of a forged document on the ground that 'it has been held in more than one case that a forger cannot be convicted both of forgery and of using as genuine the forged document.' In the first place I cannot see the necessity of any mention of abetment, the appellant himself did all the using of the forged document that was done. But there certainly never has been any judicial decision to the effect stated. If a man commits two offences he can certainly be convicted of them both more especially when they are separate transactions and the commission of one does not necessarily involve the commission of the other. The appeal is dismissed."

My attention has also been directed to a decision of the Allahabad High Court in Criminal Appeal No. 440 of 1912, decided on the 24th October 1912, in which Knox and Rafique, JJ., held that an accused could be convicted at one and the same time of offences under ss. 467 and 471, Indian Penal Code, in respect of the same document: *cf. Badri Prasad* v. *Emperor* (4). On the other hand, I have been referred to a decision of Baker, J. C., in *Digambar* v. *Emperor* (5) which is precisely to the contrary effect. The learned Judicial Commissioner in the said judgment did not, however, discuss the question in detail and simply followed the decision in *Queen Empress* v. *Umrao Lal* (2) quoted above.

Turning now to the latter case, I find myself greatly impressed by the reasoning of Aikman, J. To my mind also the language of s. 471, Indian Penal Code, most obviously suggests that this provision is expressly directed against some person other than the forger himself. Had the intention of the Legislature been that the same person could be convicted both under ss. 467 and 471, Indian Penal Code., we should have expected the learned framers of the Code to have drafted s. 471 in a very different language from that which obtains therein. Obviously, I think the reason for the presence of s. 471 on the Statute book in the somewhat unusual language which is employed therein, is in order to provide a useful alternative charge in cases where there is uncertainty as to whether the person on trial is himself the forger of the document, or has merely used it as genuine, knowing it to be nothing of the sort.

It seems to me that, coming down to fundamentals, the present appellant has already been convicted of the essential offence involving the dishonest or fraudulent intention of making use of this document in the way, he did, within the meaning of s. 464, Indian Penal Code. Although, no doubt, the act of producing this document in Court is a separate act in point of time and place, it is impossible, in my opinion, to regard these two acts as two separate and isolated offences when the forger and the person who afterwards makes use of the document is one and the same. In an analogous case of a double conviction under ss. 471 and 474, Indian Penal Code. Holmwood and Imam, JJ., in *Mobarak Ali* v. *Emperor* (6) held that convictions under ss. 471 and 474 could not stand together. In the one case the offence is the use of a document as genuine, which is known to be forged, and in the other the offence is the posses-

(1) 32 Ind. Cas. 665 at p. 667; 17 Cr. L. J. 73.
(2) 23 A. 84; A. W. N. (1900) 205.
(3) 77 Ind. Cas. 825; 25 Cr. L. J. 473; (1924) A. I. R. (N.) 162.
(4) 17 Ind. Cas. 797; 10 A. L. J. 473; 13 Cr. L. J. 861; 35 A. 62.
(5) 88 Ind. Cas. 1051; 26 Cr. L. J. 1275.
(6) 15 Ind. Cas. 81; 17 C. W. N. 94; 13 Cr. L. J. 449.

sion of such a document with intent so to use it. In the present case, therefore, it seems to me that although there was the further physical act of producing the document in Court, this factor does not constitute, in the circumstances of the case, a separate offence. That offence was completed when the document was forged with the intention of so producing it.

Still further, as I have already pointed out, it seems to me that the language of s. 471 shows only too clearly that it was directed against persons other than the forger himself. On these grounds I find myself in full agreement with my predecessor's decision in *Badri Prasad* v. *Emperor* (4) quoted above and the decision of Aikman, J., in *Queen Emprees* v. *Umrao*, (2).

In conclusion I desire to look at this matter from still another point of view. Let us assume that the framers of the Indian Penal Code when s. 471, Indian Penal Code, was drafted, had not specifically in mind the question whether or not it was to be applicable to the actual forger himself. Turning now to the language of s. 471, let us concede that it is capable, on the face of it, of two different interpretations. It may be equally permissible to argue that, as the using of the forged document is a separate act, such using, having, regard to the language used in s. 471, Indian Penal Code, constitutes a separate offence from the forgery. It is, however, equally permissible to postulate that the words "as if he had forged such document" are equivalent to "as if he had been the forger himself.", in which latter case clearly a separate conviction could not be had against the forger. In those circumstances undoubtedly the principle to be followed in applying the law in the present case is that a penal Statute like the one we are concerned with should be construed with the strict and narrow sense. When an enactment may entail penal consequences, no violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its strict language [see Wright, J., *London County Council* v. *Aylesbury Co.* (7)]. Thus where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself properly and clearly [*cf. Hull Dock Co.* v. *Browne* (8)]. Applying this standard to appellant, undoubtedly the construction favourable to him must be placed on the language of s. 471, Indian Penal Code.

I, therefore, for the above reasons am of opinion that the present conviction for the offence under s. 471 read with s. 467 cannot stand and it becomes unnecessary to consider in detail the other matters which have been agitated in the present appeal. The conviction and sentence appealed against are reversed and the appellant is acquitted.

Z. K. *Conviction reversed.*

(7) (1898) 1 Q. B. 106; 61 J. P. 759; 67 L. J. Q. B. 24; 77 L. T. 440.

(8) (1831) 36 R. R. 459; 2 B. & Ad. 43; 109 E. R. 1059.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1916 B OF 1924.

November 28, 1924.

Present :—Mr. Justice Brown.

EMPEROR—PROSECUTOR

versus

ISHAHAT AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 207, 254, 347—Commitment to Sessions, when can be made —Magistrate, power of, scope of.

Section 347 of the Cr. P. C. is couched in general terms and confers very wide powers upon Magistrates. There is no suggestion in the section that the only possible reason for a competent Magistrate to commit a case to the Sessions is that he will not be able to pass a sufficiently severe sentence. [p. 526, col. 1.]

Where a Magistrate decides under s. 207 of the Cr. P. C. that a case is one which ought to be tried by the Court of Session then he must follow the procedure laid down by Ch. XVII of the Code and not the procedure prescribed by Ch. XXI. Section 254 of the Code can have no application whatever to such a case. This section merely lays down what a Magistrate must do when proceeding with the trial of a warrant case. It would be undue extension of its scope to hold that it is meant to fetter the scope of a Magistrate in all circumstances. Section 347 of the Cr. P. C. is a general section and applies to all enquiries and trials. It gives the Magistrate power to deal with a case under the provisions of Ch. XVII at any stage before the judgment is signed and if this power is exercised then the provisions of s. 254 of the Code are no longer applicable. [p. 526, col. 2.]

Criminal revision from an order of the Special Power Magistrate, Mergui, in Criminal Trial No. 228 of 1924.

JUDGMENT.—The Sessions Judge, Mergui, had referred to this Court the proceedings in which Ishahat and one have been committed to stand their trial before his Court, with a recommendation that the commitment order be quashed. The recommendation is based on one of the grounds that the Magistrate had in the circumstances no powers to commit to Sessions. Under the provisions of s. 254 of the Cr. P. C., relating to the procedure to be observed in the trial of warrant cases, if there are grounds for presuming that the accused has committed an offence triable under the Chapter, which the Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, the Magistrate is bound to frame a charge in writing against him. The contention is that this section allows no discretion to the Magistrate, and forbids him from committing to Sessions unless he is of opinion that he is either incompetent to try the case or is unable to inflict a sufficiently severe sentence. There is authority for this view in the case of *Queen-Empress* v. *Kayemullah Mandal* (1). This case was followed in the Allahabad case of *Emperor* v. *Bindeshri Goshain* (2) but in this later case, no further reasons for the decision were given. The contrary view has been taken by a Bench of the High Court of Madras in the case of the *Crown Prosecutor* v. *Bhagavathi* (3). There is so far as I know no published decision on the point by any Court in Burma. In spite of the support he derives from the Calcutta and Allahabad cases, I am unable to accept the view of the law taken by the learned Sessions Judge. The Calcutta case was decided by a reference only to the provisions of Ch. XXI of the Cr. P. C. That Chapter deals with the procedure to be observed by Magistrates in the trial of warrant cases. Chapter XXIV contains general provisions as to inquiries and trials, and s. 347 which appears in that Chapter specifically lays down that "if in any inquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained." The section is couched in general terms and gives the Magistrate very wide powers. There is no suggestion that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence, and if that were the intention of the Legislature, it is extraordinary that there should be no indication of this in the section. Section 206 provides for the committing to the Court of Session for trial for any offence punishable by such Court. And under the provisions of s. 207 the Magistrate is bound to adopt the procedure laid down for inquiry with a view to commitment whenever in the opinion of the Magistrate the case ought to be tried by the Court of Session. This direction clearly cannot be limited by the provisions of s. 254 which apply only when a comparatively late stage of proceedings under Ch. XXI have been reached. If the Magistrate decides under s. 207 that the case is one which ought to be tried by a Court of Session then he must adopt the procedure laid down by Ch. XVII and not the procedure prescribed by Ch. XXI. Section 254 can, therefore, have no application whatever in such a case. It is to my mind quite clear that if before the commencement of the enquiry or trial, the Magistrate is of opinion that the case is one which for any reason ought to be tried by the Court of Session, then he has ample power to inquire into the case with a view to commitment, and subsequently to commit if the evidence justifies that course. Nor does there seem to be any reason for holding that nevertheless if the Magistrate has once started an inquiry or trial under Ch. XXI, he no longer has the power to commit, unless he is of opinion that the sentence which he could pass would be inadequate. Section 254 merely lays down what a Magistrate must do when proceeding with a trial of warrant cases. It would be an undue extension of its scope to hold that it was meant to fetter the scope of a Magistrate in all circumstances. Section 347 is a general section, and applies to all inquiries and trials. It gives the Magistrate

(1) 24 C. 429; 1 C. W. N. 414; 12 Ind. Dec. (N. S.) 954.
(2) 50 Ind. Cas. 161; 41 A. 454; 17 A. L. J. 456; 20 Cr. L. J. 273.
(3) 48 Ind. Cas. 337; 42 M. 83; 35 M. L. J. 559; (1918) M. W. N. 870; 19 Cr. L. J. 997; 9 L. W. 14.

power to deal with the case under the provisions of Ch. XVII at any stage before the judgment is signed, and if this power is exercised, then the provisions of s. 254 are no longer applicable. I find myself in entire agreement with the view of the law taken by the High Court of Madras. I am of opinion that the discretion of the Magistrate in the matter of committal to Sessions is not fettered in the manner suggested. The provisions of s. 348 to which the learned Sessions Judge refers are concerned with only a very special class of cases in which the need for a heavy sentence could ordinarily be the only reason for commiting to Sessions. I see no sufficient reason for quashing the commitment in this case. The proceedings will be returned to the Sessions Judge to be dealt with according to law.

Z. K. *Revision rejected.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 123 OF 1924.

September 15, 1924.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

MOTI RAM HARI—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 401—Previous conviction for dacoity—Evidence, whether relevant—Value of such evidence.

When a person is being tried for the offence of belonging to a gang of thieves, evidence that he was previously convicted of dacoity is relevant and admissible.

Emperor v. *Tukaram Malhari*, 15 Ind. Cas. 811; 14 Bom. L. R. 373 at p. 375; 13 Cr. L. J. 539 and *Bonai* v. *Emperor*, 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97, followed.

But if the conviction took place long before the second prosecution, no weight can be attached to such evidence for the purpose of proving that the accused had a habit of committing thefts.

Criminal appeal from a decision of the Additional Sessions Judge at Jalgaon.

FACTS.—Among other grounds relied on by the Trial Court for the conviction of the accused in 1923 under s. 401, one was a certified copy of the judgment of a Sessions Judge, dated December 16, 1897, under which the accused had been convicted of dacoity under s. 395, Indian Penal Code, and sentenced to three years' rigorous imprisonment. In appeal objection was made as to the admissibility of the judgment of the year 1897, and the weight attached to it by the Trial Court.

Mr. *R. W. Desai*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—* * * * * * * As to (1), objection was taken to Ex. 30, which is a certified copy of the judgment of the Sessions Judge, dated December 16, 1897, under which accused No. I, Motiram was convicted of dacoity under s. 395 of the Indian Penal Code and sentenced to three years' rigorous imprisonment. It is clear, however, that this evidence was admissible under the rulings of this Court in *Emperor* v. *Tukaram Malhari* (1) and of the Calcutta High Court in *Bonai* v. *Emperor* (2); and we see no reason to take a different view. But, as regards the weight to be attached to this piece of evidence, I think that the conviction was so long ago that it is useless except for showing that accused No. 1 is a person of criminal tendencies to theft who might be a member of the alleged gang. It certainly does not go to show that he had any habit of committing thefts in the period under consideration, for he might have reformed since he was released from Jail.

[*Note.*—The rest of the judgment proceeded with other grounds and the appeal was ultimately dismissed.—*Ed.*]

K. S. D. *Appeal dismissed.*

(1) 15 Ind. Cas. 811; 14 Bom. L. R. 373 at p. 375; 13 Cr. L. J. 539.

(2) 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1041-B OF 1924.

January 12, 1925.

Present:—Mr. Justice Carr.

MAUNG THWE—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE-PARTY.

Burma Habitual Offenders' Restriction Act (11 of

1919), ss. 4, 7—Criminal Procedure Code (Act V of 1898), ss. 110, 112, 537—Upper Burma Criminal Justice Regulation (V of 1892), Sch., cl. XV—Preliminary order—Failure to mention period of proposed restriction—Irregularity—Proceedings, legality of.

A preliminary order passed under s. 4 of the Burma Habitual Offenders' Restriction Act omitted to state the period for which it was proposed to pass an order of restriction. On the same form, however, the Magistrate passed a preliminary order under ss. 110 and 112 of the Cr. P. C., and in this case a term of three years was duly entered in the order :

Held, (1) that the accused must have been aware that the proposed restriction order was for the same term as that mentioned in the order under ss. 110 and 112 of the Cr. P. C, and that no failure of justice had in fact been occasioned ;

(2) that having regard to the provisions contained in cl. XV of the Sch. II to the Upper Burma Criminal Justice Regulation, it could not be said that the proceedings had been vitiated on account of the omission to state the period of restriction in the preliminary order.

Revision from an order of the Sub-Divisional Magistrate, Myingyan, in Criminal Miscellaneous Trial No. 113 of 1924.

Mr. *Chatterjee*, for the Petitioner.

JUDGMENT.—An order of restriction has been passed against the petitioner under s. 7 of the Burma Habitual Offenders' Restriction Act. His appeal was dismissed by the District Magistrate, Myingyan, and he now comes to this Court in revision.

On the merits of the case I see no cause to interfere with the concurrent findings of the Courts below. There was, in fact, ample evidence that the petitioner is by repute an habitual dacoit.

But the learned Advocate for the petitioner has pointed out that the preliminary order in the case omitted to state the period for which it was proposed to pass an order of restriction, as imperatively required by proviso (*a*) to s. 4 of the Habitual Offenders' Restriction Act. He contends that this omission renders the whole proceedings void.

As to the fact the learned Advocate is correct. The Magistrate appears to have left the preparation of the order to a clerk, instead of writing it himself, as he should have done. In the space provided on the form for entry of the term of the proposed order of restriction, there has been entered instead, quite meaninglessly, the name of the Magistrate.

But the Magistrate on the same form passed a preliminary order under ss. 110, 112 of the Cr. P. C., and in this case the term of three years was duly entered. I have no doubt that the petitioner was fully aware of the fact that the proposed restriction order was for the same term and that no failure of justice has in fact been occasioned.

The question, therefore, is whether the proceedings are void because of this technical omission. My own view is that they are not and that this is a mere irregularity which is cured by s. 537 of the Cr. P. C. To hold that because an imperative provision of any law has inadvertently been disregarded the whole proceedings are void, seems to be an unwarrantable extension of the principles laid down by their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (1) and one not justified by the terms of that judgment.

But I am confronted by the decision in *Parsodan* v. *Emperor* (2) in which one Judge of this Court has laid it down that the omission to state the term in the preliminary order does render the whole proceeding void. I am bound, if the cases cannot be distinguished, either to follow that decision or refer the question for decision by a Bench or a Full Bench.

I think, however, that the cases can be distinguished. That was a Lower Burma case and this is from Upper Burma and the Upper Burma Criminal Justice Regulation applies. Clause XV of the Schedule to that Regulation goes considerably farther than the Code itself and provides that "a finding, sentence or order shall not be reversed or altered on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice."

That provision is, in my view, sufficient to bar any interference in this case.

The application is, therefore, dismissed.

Z. K. *Application dismissed.*

(1) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C J. 160 (P. C.).

(2) 85 Ind. Cas. 33; 2 R. 524; (1925) A. I. R. (R.) 69; 26 Cr. L. J. 417.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION

SUMMARY SUITS Nos. 1834, 1837, 1838, 1840 AND 1843 OF 1922.

June 12, 1922.

Present:—Mr. Justice Marten.

THE TATA INDUSTRIAL BANK LTD.—PLAINTIFFS

versus

ABDUL HUSEIN HAKIMJI—DEFENDANT.

Limitation Act (IX of 1908), s. 4—Short Causes—Summer vacation—High Court, whether closed—Ex parte *decree, setting aside of—Bombay High Court Rules, rr. 2, 4.*

The High Court is not closed within the meaning of s. 4 of the Limitation Act during the summer vacation for Short Causes. [p. 533, col. 1.]

It is a question of fact in each case whether the Court is closed for any particular description of work. [*ibid.*]

The difference between a Short Cause and a Long Cause is this: that when the Judge or the Prothonotary comes to admit a plaint, it is only admitted as a Short Cause if no substantial defence appears on the plaint. If, on the other hand, there appears to be a substantial contest, the matter is treated as a Long Cause and a written statement is called for from the beginning. [p. 532, col. 1.]

Plaintiffs filed summary suits against defendants during the April vacation. The Judge in Chambers directed the returnable date for the hearing of the suits to be May 23, and on May 25 an *ex parte* decree was passed in the absence of any leave to defend. Defendants applied to set aside the order directing the suits to be heard on May 23, and also to set aside the *ex parte* decree on the ground that the Court was closed at the time it was passed:

Held, that the High Court was not closed for Summary Suits during the April vacation and, therefore, the defendants were out of time with their application for leave to defend and the *ex parte* order must stand. [p. 533, col. 1.]

Mr. *Campbell*, for the Plaintiffs.

Mr. *Jinnah*, for the Defendant.

JUDGMENT.—These five suits are all summary suits, in four of which the Tata Industrial Bank are the plaintiffs and in the last of which the Eastern Bank are the plaintiffs. They are against various defendants, but the same point arises in each of them, and, therefore, they have been taken together. The same Counsel appear for the plaintiffs and the defendants in each case. In each case there is a notice of motion to set aside the order made by Mr. Justice Crump in Chambers directing the summary suits to be heard on May 23, 1922, and also to set aside the *ex parte* decree passed by myself on the hearing of the suit in the absence of any application for leave to defend, and, thirdly, asking in the alternative that the decree may be set aside under O. XXXVII, r. 4, there being special circumstances and that the defendants may now be given leave to defend and appear.

Substantially the point in each case is this: whether within the meaning of s. 4 of the Indian Limitation Act, these Courts are closed for this class of business, *viz.*, summary suits, during the April vacation. The material dates are as follows: On April 20, 1922, the plaint was declared. On April 22, Mr. Justice Crump made his order directing the returnable date for the hearing of the suits to be May 23. He then, I am informed, directed the plaint to be returned to the Prothonotary for admission, it being unnecessary to obtain any special leave under cl. 12 of the Letters Patent. Accordingly the plaint was admitted on April 24. On May 4, the service of the summons was effected, and on May 25, the matter came before me as a summary suit and an *ex parte* decree was passed.

As regards the latter date, I should explain that the number of Short Causes fixed for May 23 was originally about 300. I directed these Short Causes to be put into two lists, the one for hearing on May 23 and the other for hearing on the 25th because the intervening date, *viz.*, the 24th, was a public holiday. In the ordinary course many of these suits were either compromised or postponed or otherwise settled before the Prothonotary, and eventually about 120 Short Causes were left. Of these I heard 70 on May 23, and the remaining 50 I took on the 25th. The summary suits came after those Short Causes. If I remember rightly they were about 12 or 14 summary suits down for hearing that day. I may say at once that in numerous summary suits applications for leave to defend were made to me during the vacation, and in several of them I have passed *ex parte* decrees in which no application has so far been made to set the decrees aside on the ground of want of jurisdiction.

I will refer for a moment to the Code to see exactly how the point is put by the defendants. Under O. XXXVII, r. 2, it is necessary in a summary suit for a defendant to get leave to defend, and if he does not obtain such leave, the case is heard as undefended in the way with which we

are all familiar. Then, if one turns to Art. 159 of the Indian Limitation Act the defendant has ten days from the service of the summons in which to apply for leave to appear and defend a summary suit. But it is under s. 4 that the defendants' present application is mainly based. That section runs as follows:—

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

In the present case the service of the summons being on May 4, you would exclude that day in the computation of time, and May 14, being a Sunday, the defendant would have up to and including May 15, in which to make this application. I cannot, without looking at my records, be sure that I was sitting in Court on May 15, but I certainly was on the 16th. I was hearing insolvency work that day and ordinary Original Side work, such as Motions, Chamber Summonses, and so on, the next day. My impression is that I was sitting in Court on May 15, as well.

* * * * *

Up to a year or so ago, rr. 2 and 3 of our High Court rules provided in r. 2 that—

The vacations to be observed in the several Courts and Offices of the High Court on its Original Side shall be four in every year, *viz.*, the Easter, April, October and Christmas vacations, and shall begin and end on such days as the Court may direct."

Then rule 3 provided:—

"The Courts and offices are closed on the following holidays."

Then comes a long list of most of the ordinary public holidays, and it ends up with "And during the Easter and Christmas Vacations (provision being made for urgent business)." Then the word "vacations" in "The Easter and Christmas Vacations" was struck out and it was described as "holidays." It will be observed that those rules did not say that the Courts were to be closed during the April vacation: but only on certain holidays.

Quite recently again there has been a change made in the dates of the public holidays, because it was represented to us that it was most inconvenient as regards certain public holidays for the High Court to keep one day and for the public at large to be keeping another day. That was what was happening, and so it was decided that our public holidays should coincide with the public holidays notified by Government, and those, for instance, under the Negotiable Instruments Act.

Accordingly r. 2 now runs as follows:—

"The vacations to be observed in the several Courts and offices of the High Court on its Original Side shall be two in every year, *viz.*, the April and October vacations, and shall begin and end on such days as the Court may direct...Besides these two vacations, the several Courts and Offices of the High Court on its Original Side shall be closed during the Easter and Christmas holidays, beginning and ending on such days as the Court may direct."

Then r. 3:—

"The Courts and Offices will be closed on holidays which will be published in the Bombay Government Gazette after the annual Bank holidays are notified by Government. And during the Easter and Christmas holidays (provision being made for urgent business.)"

Stopping there for a moment, I think the present rules still preserve a distinction which I have always understood to be the fact on the Original Side, *viz.*, that there are two descriptions of holidays or vacations. One class are absolutely closed holidays, and the other class are mere vacations or ordinary holidays. The Christmas and Easter holidays, for instance, are absolutely closed holidays, as are also the public days notified by Government. On those days there are no clerks in the building and no Judge is sitting. There may possibly be one or two officials for some particular business but, speaking generally, this building, like other Government buildings, is closed. That is not, however, the case with the April and October vacations. The whole office is then at work, although at reduced hours; and though this may be the time of year for certain officials to go away on leave, the members of the office and their subordinates are substantially speaking on duty the whole of the vacation.

This will be seen from r. 5 which says:

"The offices of the Court (except in vacation and holidays) are open daily" for certain hours. Then it goes on: "In vacation the offices are open daily from 11-30 A. M. to 1-30 P. M. for urgent work only; but on Saturdays and holidays they are closed, provision being made for very urgent business." I draw attention to that word "closed." It once more emphasises the distinction between the days when the Courts are closed and the days when there is only, say, partial work going on.

Accordingly in the new r. 2, I do not think the use of the words "*besides* these two vacations" import that the Court and offices are to be closed during the April vacation as well as during the Easter and Christmas holidays.

Then unfortunately there has been a recent alteration in the numbering of the various rules dealing with writs of summons, I was not aware that the old numbers had been altered in this way, and I think it must have been done while I was away on furlough. But I am again reading from the Prothonotary's copy. Under the present r. 102, which up to a short time ago was 101, the returnable date in summary suits is four weeks from the date of the admission of the plaint; in Short Causes it is three weeks from the date of the admission of the plaint; and in Long Causes it is eight weeks from the date of the admission of the plaint; and "in all other cases, within such time as may be considered sufficient for the transmission, service and return of the summons." The expression "returnable date" really means there the hearing date and not the date of appearance. Our rules at times are a little troublesome in their wording to one who is accustomed to the rules of the English Courts. But in another case I have held after making due investigation that the expression "returnable date" in our Bombay Rules means the hearing date. Accordingly it will be seen here that the plaint being admitted on April 24, the hearing date was fixed for May 23.

Then under r. 104, formerly 103, all writs have to be delivered to the Sheriff within thirty-six days from the filing of the plaint or within forty-six days during the vacations. There are corresponding provisions in r. 369, formerly 366, as to the Sheriff not receiving the summons after those dates unless the Judge so orders. Then in r. 267, which was formerly 266, in those cases which do not come under the Statute of Limitations, you reckon time exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday or other day on which the offices are closed, in "which case the time shall be reckoned exclusively of that day also, and any succeeding day or days on which the offices continue closed: Provided that written statements due in vacations and appeals, the time for filing which expires in vacation, may be filed on the day the Court re-opens."

If one eliminated that proviso, one would have thought that written statements and appeals under this rule would have to be filed during the vacation, because otherwise you would not want this proviso. But the proviso makes it clear that written statements and appeals are to be excluded from what would otherwise be the rule, and that they may be filed on the opening day of the next term.

Then in r. 270, formerly 269, the Court has got power to enlarge or abridge the time appointed by the rules or fixed by any order enlarging time, for doing any act or taking any proceeding upon terms.

Then in r. 834 (old r. 814):—

"Whenever any business is required to be done in vacation, the attorney or party in person shall give reasonable notice thereof to the Prothonotary or the officer whose duty it is to attend such business."

I think those are the more material rules which have been brought to my attention. As regards the numbering, it just occurs to me, as I deliver judgment, that possibly the red ink numbers which the Prothonotary has inserted in his copy represent the numbers which will appear in the new rule book. If so, no harm will be done because I have given the numbers, the new and the old.

Now, what has actually taken place during this vacation—and this vacation is, I suppose, merely typical of the vacations experienced during the last two or three years—is that the Court in some of its branches has remained open as usual. It has remained open as usual for the disposal of all criminal work on the Appellate Side. It has remained open for urgent applications in criminal matters on the Original Side. I have, for instance, disposed of one application raising a question of jurisdiction as to whether I could stay a sentence of death under a clause in the Letters Patent without there being a point

of law reserved by the Trial Judge or without there being any certificate of the Advocate-General, he being absent from India. The Court on its Insolvency Side has done its work as usual. The Insolvency Court has been held twice a month according to the ordinary practice in term time; and all *interim* applications for adjudication orders and arrests, and instructions and directions to the Official Assignee have been made to me just as in term time. The Court has also proceeded with its Admiralty Jurisdiction. Normally that jurisdiction is extremely small, but during this vacation we had two Admiralty suits which I suppose in all must have occupied at least three full days of hearing in Court. They, too, have raised novel points of jurisdiction, involving one going back into the history of our Admiralty Jurisdiction for the last one hundred years and upwards.

But taking the more ordinary work on the Original Side, we have normally three classes of suits: Summary suits, Short Causes and Long Causes. They are generally taken in that order as representing their urgency and the likelihood of any defence. The difference between a Short Cause and a Long Cause is this: that when the Judge or the Prothonotary comes to admit a plaint, it is only admitted as a Short Cause if no substantial defence appears on the plaint. If, on the other hand, there appears to be a substantial contest, the matter is treated as Long Cause and a written statement is called for from the beginning. And the system we have in our Courts is this: we have a list prepared of Short Causes, and then if the defendant can show the Court that he has got a defence which requires time to be heard, the matter is transferred to the Long Cause list. But otherwise the Court proceeds to fix some short date for hearing, or in some cases may hear the case there and then, whether or not any written statement has been put in or not. If, of course, the defendant does not appear, then the case is disposed of at the due hearing date.

Apart from that work, there has been a large quantity of motions for injunctions, applications for arrest, receiverships, and also miscellaneous Chamber work.

*. * * * *

Mr. Jinnah's point is that if the Courts are "closed" within the meaning of s. 4 of the Indian Limitation Act, then whether in fact the vacation Judges do one suit or 1,000 or 5,000 does not matter: for the Courts are still "closed." But I wish to emphasise that so far as certain classes of business are concerned, these Courts have, undoubtedly, not been closed. They certainly had not been closed as regards the admission of plaints, the filing of written statements, and what is much more important, the hearing of Short Causes, I entirely fail to see how it can be argued that this Court has no jurisdiction to hear in the vacation summary suits, although it has jurisdiction to hear suits which are not of such a summary nature, *viz.*, Short Causes.

I may also add that though it is not our practice in the vacation to hear ordinary Long Causes, I should be very slow to hold that in certain cases this Court will never have the jurisdiction to hear a Long Cause in vacation. Take for instance the two Admiralty suits I have mentioned. In one case by consent the matter was heard in the vacation. In the other case an early date for hearing in the vacation was granted despite opposition. Those were cases where seamen were waiting in Bombay harbour for their wages. In the English Admiralty Courts where seamen are concerned the Court does its best to expedite the suit irrespective of what would be the case in an ordinary suit between landsmen.

Take another kind of case. Suppose you have got a light and air suit, and it is vitally important that the builder should get in his foundation or his roof before the monsoon breaks at the end of May or the beginning of June. But there is some contested point. Is it to be said that the Judge has no jurisdiction to hear that Long Cause in the vacation? Or I may take a suit for specific performance of a contract for the sale of real estate, where it is vitally important that an alleged purchaser should know whether he is the owner of the property or not. That again might be a case where the Judge would think it right in the interests of public justice that the case should be expedited and heard in the vacation.

Mr. Jinnah's argument for the defendants practically amounts to this that this Court has no jurisdiction to hear one important class of suits during the vacation. In other words, it has no jurisdiction to hear summary suits, although it has jurisdiction to hear suits of lesser urgency, *viz.*, Short

Causes. In my opinion s. 4 of the Indian Limitation Act has been carefully worded. It does not talk about the vacation: it talks about "when the Court is closed." In my opinion it is a question of fact in each case whether the Court is closed for any particular description of work. To my mind it is impossible to say that our High Court is closed for Short Causes, and it is equally impossible to say it is closed for Summary Suits, if they have been directed by the Judge to be heard in the vacation.

In my opinion Mr. Justice Crump had ample jurisdiction to admit the plaints in these Summary Suits and to direct that they should be heard in the vacation. In my opinion the Court was not closed as regards that particular description of suits during the vacation any more than it was for Short Causes. And nobody can suggest as far as the making of the application to the Court is concerned, that there was the slightest practical difficulty in applying to the Court because, as I have already pointed out on all material dates in the present case, I was sitting in Court almost every day including Saturday.

Now what actually happened was this. When the suits came on for hearing before me the defendants did not appear by Counsel. Their Solicitor stated something to the effect that I had no jurisdiction to hear the suits during the vacation. I said that as no leave to defend had been obtained, he had no *locus standi*. Then in one or it may possibly be in some other of the suits he asked for leave to defend. But there was no affidavit and there was no application before me in writing. Nothing except what the Solicitor said. I, accordingly, declined to entertain the application, and made the decrees.

At a later date the defendants appeared by Counsel and got my leave to serve the present notice of motion in each case and to-day I have had the advantage of a very useful argument from Mr Jinnah in the course of which I believe he has drawn my attention to all the points that can be said in favour of his client.

The conclusion which I have arrived at is this: that these Courts were not closed during this April vacation for the disposal of summary suits, and, therefore, the defendants were out of time with their application for leave to defend, and that, so far as that goes, the *ex parte* order must stand.

Now I come to a further point. Mr. Jinnah for the defendants has argued that assuming the *ex parte* decree was properly made, still under O. XXXVII, r. 4, I have power to set aside the decree. Rule 4 runs:—

"After decree, the Court may, under special circumstances, set aside the decree, and if necessary, stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

We are now at June 12. But even now I have no affidavit before me nor any indication of what the defence, if any, of the defendants to these suits is. As far as one of them is concerned, *viz.*, the last suit by the Eastern Bank, my attention has been drawn to a letter in which the defendants have admitted their liability and have given a promise to pay. So, so far as that suit is concerned, one fails to see how there could be any defence. How can I say then there are here any special circumstances in the other suits? It is said that these special circumstances arise from the fact of the vacation and from the state of the authorities. Mr. Jinnah has cited to me altogether three authorities, one in *Ranchordas Tribhowandas* v. *Pestonji Jehangir* (1), another in *Rani Venkata Ramania* v. *Kherode Mull* (2), and the remaining one in *Nachiyappa Mudali* v. *Ayyasami Ayyar* (3). Not one of them deals with Short Causes. They deal with the point about admission of plaints or appeals and there is also a reference in Mr. Justice Russell's decision in *Ranchordas Tribhowandas* v. *Pestonji Jehangir* (1) to a case decided by Sir Charles Sargent and Mr. Justice Farran as regards the time for filing an appeal. But, as I have already pointed out, in our rules it is perfectly clear that the time for petitions in appeal does not expire in the vacation but extends to the opening days of the term time. So, there being an express rule on the subject, there seems nothing in that point. But I do draw an important distinction between those cases and the cases where the Court has directed that certain business shall be done As regards

(1) 9 Bom. L. R. 1329.
(2) 3 Ind. Cas. 400; 10 C. L. J. 118.
(3) 5 M. 189; 2 Ind. Dec. (N. S.) 132 (F. B.).

the case of *Nachiyappa Mudali* v. *Ayyasami Ayyar* (3) which was a decision of the Full Bench as regards an appeal in a District Court, it appears that four of the learned Judges there took very much the same view as I have endeavoured to express in the present case, and that the remaining Judge took a contrary view. Taking at its best, one can see on the authorities that the defendants were running a big risk in assuming that the decision of the Full Bench of the Madras High Court was an erroneous decision.

My own view is this. I think the defendants here in all probability—I can only judge by the facts before me—were endeavouring to gain time. The way they appeared before me in Chambers by a Solicitor only and even their present conduct in putting in no affidavit would seem to bear that point out. It is not Mr. Jinnah's fault, but the fact remains that if I were to set aside the decrees and to give leave to the defendants to appear and defend the suits, I have not the remotest idea whether they have got any defence or not. One test to apply in such cases is: are you prepared to bring the money into Court? I put that question to Counsel for the defendants and added that it must be with interest and include a reasonable sum for costs. The answer given to me was "No" and I thought then that the matter was finished. But at the end of the case it was stated that the Tata Bank in other cases had the security of immoveable property, and, therefore, it was unreasonable to ask that money should be brought into Court. Mr. Campbell, however, says that these title-deeds are securities not for the notes in the present case but for other promissory notes which are the subject of pending litigation.

It seems to me, therefore, that the mere fact that the Bank are secured as regards certain other debts is no reason why the defendants should not bring into Court something in respect of the present debt. It does not follow that the Bank can hold these other title-deeds as security for their claims in the present suits. At any rate I have no documents at all before me, and all I have got at the present moment are the conflicting statements by Counsel on either side. Assuming there is any value, which I do not know, in the equity of redemption of these other immoveable properties, there is nothing to prevent the defendants from raising a second mortgage on the value of the equity of redemption. They have had ample time here but in fact have done nothing.

In my opinion there are no special circumstances before me to-day within O. XXXVII, r. 4, and even if there were I should, as a condition of granting leave to defend, require the defendants to bring into Court within seven days the amount of the decree claimed with interest up to date and a sum of Rs. 203 as security for costs of the summary suits and of the notices of motion. These terms admittedly cannot be complied with, and under these circumstances I should decline to grant any leave under O. XXXVII, r. 4.

In the result, all these motions will be dismissed and dismissed with costs.

I should have added that a question arose to my mind as to whether these notices of motion should have been heard by my brother Crump or by myself, but in the events which have happened, Mr. Justice Crump would have been unable to attend Court to-day and he has asked me to hear these motions for him if and in so far as any such request is necessary.

K. S. D. *Motions dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 12 OF 1925.

April 6, 1925.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

Haji ANIS AHMAD—DEFENDANT—APPELLANT

versus

Musammat HAFIZUNNISA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (11), 52—Legal representative, decree obtained against—Creditor, whether entitled to proceed against property in hands of legal representative in excess of his share—Auction-purchaser, position of—Muhammadan Law—Widow, whether legal representative.

Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased in the hands of the judgment-debtor, the decree may be executed by the attachment and sale of any such property under s. 52 of the C. P. C. The legal representatives of the deceased must settle

the matter of their shares between themselves. The creditor is entitled to attach and sell any property of the deceased in payment of the judgment-debt independently of the fact whether such property is up to the share of the judgment-debtor in the property of the deceased, or in excess thereof. The section gives a speedy remedy to a creditor of a deceased person and saves him the trouble of waiting until the different heirs have decided between themselves either amicably or through Court as to what property each heir is to inherit. The creditor is not concerned with the rights of the heirs but is only concerned with his own right to recover his debt out of the property of the deceased. If the legal representative who is sued does not exercise due diligence to satisfy the debt out of the least amount of the property which would suffice for the purpose and a larger portion of the property than is necessary is sold in execution of the decree, he will be liable for his negligence and want of care in damages to the other heirs of the deceased, but the latter would have no remedy against the auction-purchaser where no fraud or collusion is alleged. [p. 536, col. 2; p. 537, col. 1.]

The widow of a deceased Muhammadan who retains possession of the property of the deceased in lieu of her dower is a person who in law represents the estate of the deceased and is, therefore, a legal representative within the meaning of the definition of the term given in s. 2 (11) of the C. P. C. [p. 537, col. 2.]

Appeal from a decree of the Subordinate Judge, Sitapur, in Suit No. 50 of 1923, dated the 27th August 1923.

Messrs. *M. Wasim* and *Khaliquzzaman*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.

Dalal, J. C.—This first appeal, triable by a Single Judge, was referred by me to a Bench of two Judges for decision. I shall confine myself entirely to the facts of the case. The matter in issue is full of difficulty and the different High Courts, and even the same High Court, have passed conflicting judgments. The necessity does not arise so I shall not presume to make any general observations on the subject.

To start with, it may be made clear that the Trial Court of the Subordinate Judge has failed to distinguish, as it ought, the ruling of this Court in *Jadu Nath Singh* v. *Afzal Khanam* (1). In that case the decree which was executed was not a money decree but was one for the enforcement of a charge. The learned Judge who delivered the judgment has more than once pointed out this fact in his judgment. On page 193* he says:—"It is also to be noticed about this suit that it was not a suit to recover money which was owing from Nawab Wala Qadar." Again on page 196* he has emphasized this fact: "Moreover I have already referred to the nature of the claim which was made by Kanhaiya Lal and shown that it was not in its entirety a claim for money due from the deceased Wala Qadar." The suit before the lower Court was essentially one for the recovery of money due from a deceased debtor. Nor is the recent Bench judgment in *Kaniz Abbas* v. *Bala Din* (2), which was repeatedly quoted during arguments, relevant. One of the two judgments in that case was delivered by me. There also the decree to be executed was one for foreclosure.

The facts here are these: The debts were owing from one Munshi Nizam Ahmad. He left at his death two widows: *Musammat* Batul-un-nisa and *Musammat* Hafiz-un-nisa and by *Musammat* Batul-un-nisa two minor grandsons of a predeceased son and by *Musammat* Hafiz-un-nisa two children, a son Sultan Ahmad and a daughter Kaniz Fatima. *Musammat* Batul-un-nisa took possession of the entire assets of M. Nizam Ahmad partly as heir, partly as guardian of her two minor grandchildren on the basis of a deed of gift executed by Nizam Ahmad and partly in lieu of dower debt due to her. She also declared that *Musammat* Hafiz-un-nisa was not the married wife and that her children were not legitimate. While *Musammat* Batul-un-nisa was in sole possession, Lachmi Narain a creditor of Nizam Ahmad sued her on foot of two pro-notes executed by him and obtained a decree on 12th July 1917. Another decree was obtained by Raghubir and Raghunath on foot of three pro-notes on 31st July 1917 against *Musammat* Batul-un-nisa and her two grandsons on confession of judgment. Both the decrees were assigned to one Ram Din who executed them and put to sale the village Husainganj and half of village Baragaon. Both these properties were purchased by one Anis Ahmad. Properties were sold, Baragaon on 28th June, 1918 for Rs. 1,100 and Husainganj on 20th December, 1918 for Rs. 5,100. The decrees were for smaller amounts and the balance of the money was received by *Musammat* Batul-un-nisa. It may also be mentioned that in the plaints, as required by the provisions of O. VIII, r. 5 the defendants were held to be liable to be called upon to answer the plaintiff's demand because she or they were legal representatives of the deceased debtor Nizam Ahmad. The decrees, there-

(1) 57 Ind. Cas. 526; 8 O. L. J 191; 7 O. L. J. 362; 2 U. P. L. R. (O.) 118.

(2) 87 Ind Cas. 892; 2 O. W. N. 34; 12 O. L. J. 37; (1925) A. I. R. (O.) 330; 28 O. C. 177.

*Pages of 8 O.L. J.—[*Ed.*]

fore, in effect were passed, one against *Musammat* Batul-un-nisa and the other against her and her grandsons as legal representatives of the deceased debtor Nizam Ahmad. (Plaint A-34).

Hafiz-un-nisa, Sultan Ahmad and Kaniz Fatima sued *Musammat* Batul-un-nisa and her grandsons for the recovery of their share of the property of Nizam Ahmad on 15th January 1918. The litigation ended in this Court on 27th October, 1921 when a judgment was delivered by a Bench [*Hafiz-un-nisa* v. *Jawahir Singh* (3).] In that litigation the legal marriage of *Musammat* Hafiz-un-nisa and the legitimacy of her children was denied. That defence failed but as to the rest the deed of gift was upheld as also *Musammat* Batul-un-nisa's right to remain in possession in lieu of her dower debt. Hafizun-un-nisa and her two children obtained a decree of their share of the property outside the gifted property on payment to *Musammat* Batul-un-nisa of the proportionate share of dower debt.

It is clear, therefore, that when a money suit was brought in 1917 and when two villages sold in execution of money decrees in 1918, *Musammat* Batul-un-nisa and her grandsons were in effect the only legal representatives of M. Nizam Ahmad so far as actual possession of the property was concerned. The other heirs were entitled to possession of their share of certain properties only on payment of a certain sum of money to *Musammat* Batul-un-nisa. The present suit was filed by *Musammat* Hafiz-un-nisa and her children for recovery of their share of the property sold at auction as stated above on 28th June 1918 and 20th December 1918. The learned Judge of the Trial Court wrongly relied, as already stated, on the ruling reported as *Jadu Nath Singh* v. *Afzal Khanam* (1), and granted them a decree on deposit of their share of the decretal amount (and not of their share of the auction price). The property in suit consists of equity of redemption and is in possession of mortgagees, so the decree was one for declaration and not for possession.

The purchaser Anis Ahmad has appealed. In my opinion the appeal must succeed. Batul-un-nisa and her grandsons were effectively in possession of the property of the deceased and they were the only persons whom a creditor need have sued in 1917 and 1918. Section 52, C. P. C. lays down that where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property it may be executed by the attachment and sale of any such property. It was sought to be argued on behalf of the appellant that the property which could be sold would not be any property of the deceased but only the defendant's share of the property of the deceased. No such reservation is stated in the section. My opinion is that the legal representatives must settle the matter of their shares between themselves and the creditor, in execution of a decree for the payment of money, is entitled to attach and sell any property of the deceased in the possession of the defendant independently of the fact whether the property in such possession is up to the share of the defendant in the property of the deceased or in excess thereof. Procedure gives a speedy remedy to a creditor of a deceased person and saves him the trouble of waiting until the different heirs have decided between themselves either amicably or through Court as to what property each heir is to inherit. The creditor is not concerned according to the privilege given to him by s. 52, with the rights of the heirs but is only concerned with his own right to recover his money debt out of the property of the deceased. The present case is much stronger because even up to 1921 when this Court finally settled the dispute between the two wives of the debtor *Musammat* Batul-un-nisa and her grandsons were the only persons entitled to physical possession of the property of the deceased. It was pointed out that a far larger amount of property was sold than need have been sold in execution of the decree. If this was due to the negligence of *Musammat* Batul-un-nisa the plaintiffs may have their remedy against her heirs. The purchaser cannot be held responsible for any neglect of the person in possession. In the present case we have not even to inquire whether a person in wrongful possession or an intermeddler can be made a defendant as a legal representative. In the present case, as pointed out by me repeatedly, *Musammat* Batul-un-nisa and her two grandsons were the only effective and full legal represen-

(1) 66 Ind. Cas. 24; 24 O. C. 374.

tatives of the deceased at the time of the auction sale.

I hold that the purchase by the appellant cannot be questioned by the plaintiffs who are heirs of Nizam Ahmad. The decree was passed against *Musammat* Batul-un-nisa and her grandsons as legal representatives of the deceased person Nizam Ahmad. It was one for the payment of money and the judgment-creditors were entitled to execute them by attachment and sale of any property of the deceased. If the legal representatives who were sued did not exercise due diligence to satisfy the debt out of the least amount of property they will be liable for their negligence and want of care in damages but not the purchaser at auction sale where no fraud or collusion is alleged.

I would decree the appeal and dismiss the plaintiff's suit with costs of both the Courts.

Wazir Hasan, A. J. C.—The decrees in execution of which the sales in question were held were simple money decrees and having regard to the pleadings of the suits in which those decrees were passed there can be no doubt that the defendants to those suits legally represented the estate of the deceased debtor, Nizam Ahmad. The decrees further directed in specific terms that the amount of the debt decreed thereby would be realizable out of the property of the deceased judgment-debtor. In the circumstances, therefore, the provisions of s. 52 (1) of the C. P. C., 1908, fully apply and under those provisions the decrees could be executed as they were by the attachment and sale of the deceased debtor's property wherever and in whosesoever hands found.

On the date of the two suits in which the decrees, in execution of which the property now in suit was sold, were passed the status which *Musammat* Batul-un-nisa occupied in respect of her deceased husband's property was one which is recognized by the Hanafi Muhammadan Law as a legal status. She was in possession of that property in lieu of her dower. In the recent case of *Maina Bibi* v. *Vakil Ahmad* (4), Lord Atkinson says:—"The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by Muhammadan Law." *Musammat* Batul-un-nisa, therefore, was a person who in law represents the estate of a "deceased person" and she was, therefore, a legal representative within the meaning of the definition of the term given in s. 2, cl. (11), of the C. P. C., 1908. I concur in the order proposed to be passed by my learned brother that the appeal should be accepted, the decree of the lower Court should be reversed and the suit dismissed with costs throughout.

By the Court.—The appeal is decreed and the suit dismissed with costs throughout.

Z. K. *Appeal decreed.*

(4) 86 Ind. Cas. 579; 52 I A. 145; 23 A. L. J. 115; (1925) A. I. R. (P. C.) 63; 2 O. W. N. 180; L. R. 6 A. (P. C.) 25; 48 M. L. J. 667; 27 Bom. L. R. 796; 47 A. 250 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 267 OF 1924.

April 22, 1925.

Present:—Mr. Dalal, J. C.

NASRULLAH KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUL HAMID—PLAINTIFF—RESPONDENT.

Oudh Laws Act (XVIII of 1876), s. 9 (2), (3)—Pre-emption—Sale of proprietary tenure—Proprietors and under-proprietors, whether co-sharers—Preference.

Where the property sold is a proprietary tenure, only the proprietors of the *mahal* in which the property is situate come within cl. (2) of s. 9 of the Oudh Laws Act as "co-sharers" of the *mahal*; the under-proprietors in the *mahal* come within cl. (3) of the section as members of the village community. [p. 538, col. 1.]

Therefore, where a proprietary tenure is sold and the pre-emptor is a co-sharer of proprietary rights in the *mahal* and the vendees are under-proprietors in the *mahal*, the pre-emptor has a preferential right of pre-emption. [p. 538, col. 2.]

Bakkha Singh v. *Gaya Din*, 26 Ind. Cas. 517; 17 O. C. 339; 2 O. L. J. 148, dissented from.

Drigbijai Singh v. *Court of Wards, Ramnagar Estate*, 5 O. C. 266 and *Gajadhar* v. *Raja Udit Narain Singh*, 34 Ind. Cas. 682; 3 O. L. J. 193, followed.

Second appeal against a decree of the Additional Subordinate Judge, Gonda, dated the 1st March 1924, reversing that of the Munsif, Utraula, dated the 4th August 1923.

Mr. *Naim Ullah*, for the Appellants.

Mr. *Wasim*, for the Respondent.

JUDGMENT.—The lower Appellate Court has written a well-reasoned judgment on the subject of the preferential right of the vendees-appellants and the plaintiff-pre-emptor. The tenure which has been

sold is a proprietary tenure of 3 annas and 6-pies. There is only one *mahal* in which the plaintiff-pre-emptor is a co-sharer of proprietary rights and the vendees are under-proprietors. The Trial Court held that the proprietors and under-proprietors have one entity and, therefore, came in cl. 2 of s 9 of the Oudh Laws Act (XVIII of 1876) of co-sharers of the whole *mahal*. The Trial Court, therefore, directed lots to be drawn and the defendants being successful in the lottery, the plaintiff appealed to the lower Appellate Court. This Court, in my opinion, rightly pointed out that the property sold being proprietary tenure only the proprietors came within cl. 2 of co-sharers of the whole *mahal* and the under-proprietors came in cl. 3 of members of the village community. The lower Appellate Court erred to distinguish the ruling of *Bakkha Singh* v. *Gaya Din* (1) of a Single Judge of this Court.

In my opinion that ruling is not distinguishable, and if the same learned Judge had not expressed a different opinion later on in *Gajadhar* v. *Raja Udit Narain Singh* (2). I would have referred this case to a Bench of two Judges. I am not in agreement with the observations of the learned Judge on page 341 of the report of 17 Oudh Cases. The learned Judge deduced from the decision in the case of *Drigbijai Singh* v. *Court of Wards, Ramnagar Estate* (3) that according to a judgment of a Bench of this Court proprietors and under-proprietors of one *mahal* formed one body and came within cl. 2. In my opinion such a conclusion is not justified by the Bench ruling of this Court. Both Judges agreed that when a proprietary tenure is sold an under-proprietor would not come within cl. 2 of co-sharers of the whole *mahal*. Disagreement between the two Judges was as to whether an under-proprietor under such circumstances came within the category of the member of a village community in the 3rd clause or not. The opinion of the Judges who favoured the view that the under-proprietor came whithin the 3rd clause was confirmed by the High Court of Allahabad on reference. In *Bakkha Singh* v. *Gaya Din* (1), the learned Judge stated that the decision in *Drigbijai Singh* v. *Court of Wards, Ramnagar Estate* (3) did not deal explicitly with cls. 1 and 2, but, in my opinion, it did and specifically held that an under-proprietor would not come within cl. 2 when a proprietary tenure was sold.

In the Bench case of *Gajadhar* v. *Raja Udit Narain Singh* (2), the learned Judge (now Mr. Justice Stuart) who delivered judgment in the case in *Bakkha Singh* v. *Gaya Din* (1) was one of the Judges of the Bench. In this case plots of proprietary tenure were sold as in the case before me. The plaintiff was a proprietor but not a co-sharer in the *mahal*, so he did not fall under the second clause. The defendant was an under-proprietor in the same *mahal*, yet the Bench held that he did not fall under the second clause as would have been the case if the principle enunciated in *Bakkha Singh* v. *Gaya Din* (1) had been followed but came within the 3rd clause. The under-proprietor defendant of that case was in the same position as the under-proprietor defendant of the present case, that is, he was under-proprietor of the *mahal* in which the vended property was situated. The Bench held that he fell within the 3rd clause and not in the 2nd and, therefore, his rights of pre-emption were not superior to those of a proprietor of another *mahal*. I, therefore, uphold the lower Appellate Court's finding that the plaintiff has a preferential right of pre-emption.

Apparently by a slip the lower Appellate Court decreed possession on payment by the plaintiff of Rs. 440 instead of Rs. 800. That portion of the decree must, therefore, be amended. I amend the decree accordingly and direct that the plaintiff shall be entitled to possession on deposit of Rs. 800 in the Trial Court within one month of to-day's date. The usual pre-emption decree shall be prepared with results to follow as directed therein. I direct parties to bear their own costs here.

Orders as to other costs of the lower Appellate Court are maintained.

Z. K. *Decree amended.*

(1) 26 Ind. Cas. 517; 17 O. C. 339; 2 O. L. J. 148.
(2) 34 Ind. Cas. 682; 3 O. L. J. 193.
(3) 5 O. C. 266.

BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 245 AND 254 OF 1920.

August 15, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice and Mr. Justice Fawcett.

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—APPELLANT

versus

GIRJABAI SHIVDEORAO VINCHURKAR—PLAINTIFF—RESPONDENT.

Saranjam—*Grant of royal share of revenue—Resumption, effect of - Crown, position of*—Saranjamdar, *rights of*.

When the Government resume a grant, which is a grant of the royal share of the revenue, they do not acquire the *mirasi* or the occupancy right which is a heritable and transferable right in holdings of which the *saranjamdar* has become the *khatedar* during the continuance of the grant. [p. 542, col. 1.]

Per *Shah, Ag. C. J.*—If the Crown claims to have acquired a right to the lands of a *saranjamdar* on the ground that the holder died without leaving any heir, it must be alleged and proved. [p. 540, col. 2.]

Gridari Lall Roy v. *The Bengal Government*, 12 M. I. A. 448 at p. 454; 10 W R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 3 Mad. Jur. 386; 20 E. R. 408; 1 Ind. Dec. (N. S.) 28 (P. C.) and *Secretary of State for India* v. *Raibatrao Hari*, 28 B 276 at p. 283; 6 Bom. L. R. 43, referred to.

When the Government resume a grant of the royal share of the revenue, they can resume what they granted, namely, the royal share of the revenue and nothing more. [p. 542, col. 1.]

Ganpatrav Trimbak Patwardhan v. *Ganesh Baji Bhat*, 10 B. 112; 5 Ind Dec. (N. S.) 460, *Vishnu Trimbak* v. *Tatia*, 1 B. H. C R. (A. C. J.) 22, *Ramchandra Mantri* v. *Venkatrao*, 6 B. 598 at p. 608; 3 Ind. Dec. (N. S.) 854 and *Hari Sadashiv* v. *Shaik Ajmudin*, 11 B. 235 at p. 240; 6 Ind. Dec. (N. S.) 154, referred to.

In the absence of any evidence to prove that a grant is of the soil, the presumption is that the grant is of the royal share of the revenue. [p. 543, col. 1.]

In the case of a grant of the royal share of the revenue, it is open to the grantee to make the best use of the grant for his own benefit, that is, to appropriate lands to his own use, subject to the payment of the royal share of the revenue, and to create rights of occupancy in his own favour, or in favour of third parties. [*ibid.*]

A *saranjam* grant carries with it certain incidental benefits to the grantee personally which an ordinary lease or a tenancy for life would not give. [p. 544, col. 2.]

Per *Fawcett, J.*—A sale of part of the *saranjam* estate by a *saranjamdar* is invalid as against his successor or the Government as the reversioner. [p. 546, col. 2.]

Gulabdas Jugjivandas v. *Collector of Surat*, 3 B. 186; 6 I. A. 54: 3 Sar. P. C. J. 889; 2 Ind Dec. (N. S.) 125 (P. C.), referred to.

A *saranjamdar*, by availing himself of his powers of management as *saranjamdar*, cannot gain for himself and his heirs an advantage in derogation of the rights of Government and his successors to whom Government may see fit to re-grant the *saranjam* [p. 547, col. 2.]

The power of resumption is not, therefore, confined to the right to take the royal share of the revenue. [p. 548, col. 2.]

Cross-appeals from the decision of the District Judge, Nasik, in Suit No. 5 of 1914.

FACTS.—The plaintiff's predecessors-in-title had been in the enjoyment of a grant of certain villages from the Government for many generations. In the course of their *saranjam* they also acquired occupancy rights over certain fields in village Manmad either by surrender or forfeiture, and held those rights for over one hundred and fifty years.

One Raghunathrao, the representative of the family, while on his death-bed in 1889, adopted Shivdeorao, the husband of the plaintiff in the present suit. After his death, in the same year, the Government did not recognize the adoption of Shivdeorao and resumed the grant and also the *mirasi* and occupancy rights acquired by the grantees as their private property and enjoyed by them for many years. On reference to the Commissioner, he also passed orders in the year 1913 that on the lapse of the *saranjam* to the Government the occupancy rights passed to the Government as well.

Shivdeorao having died his widow sued the Secretary of State claiming the lands over which *mirasi* and occupancy rights were acquired as the private property of the family basing her claim on a sale-deed of 1750 A. D. or in the alternative on the ground of possession owing to surrender or forfeiture of the *khatedar's* rights.

The First Court did not recognize the sale-deed, but gave the plaintiff a decree on the basis of alternative grounds from which appeal was made to the High Court.

Mr. *H. C. Coyajee* (with him Mr. *S. S. Patkar*, Government Pleader), for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *S. S. Bokhale*), for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—[His Lordship, after stating the facts of the case and disbelieving that the occupancy rights were acquired by the deed of 1755, proceeded:] The next point relates to the question as to how they were acquired. On this point it seems to me that the view taken by the learned Trial Judge is correct that under the circumstances the lands must be taken to have been acquired in any one of the

ways in which such acquisition is possible. It must be remembered, as pointed out by the learned Judge, that the fact that some of the lands were entered as part of the village site later on was merely an accident, due to the survey in the nineties, when it was found that it was not being used for agricultural purposes. Though at this distance of time we may not know as to when and how these lands were acquired, it is clear that in any alienated village the *inamdar* or the *saranjamdar* has full right of disposal with reference to holdings which are either relinquished or forfeited for any valid reason. If the Survey Settlement has been extended to the alienated village, the holders of lands in the village would have the same rights and obligations as occupants in a Khalsa village. It is not suggested that the Survey Settlement was extended to the said village prior to the resumption. If it had been, the *khatedar* would clearly have the rights of an occupant under the Bombay Land Revenue Code as in a Khalsa village according to s. 217 of the Bombay Land Revenue Code. Whenever there is any relinquishment on any ground, or forfeiture of land for non-payment of the royal share of the revenue, the land would be at the disposal of the *saranjamdar*, and he may dispose of it by giving the *mirasi* or the occupancy right to any third person or by taking it up himself. It is also possible that the *mirasi* or occupancy right would be acquired for consideration. It is true that in the present case the plea of purchase set up is not established, and, as no plea of any other purchase is put forward, that possibility may be left out of account. Then it is possible that the line of any family may become extinct; and there being no heirs, the *saranjamdar* may take possession of the land. But in such a case his possession would clearly be wrongful. In that case the right would belong to the Crown as the ultimate heir of the deceased heirless person. That right forms no part of the *saranjam*. Whether it be a *saranjam* village or an *inam* village, the right in such a case would belong to the Crown and to the Crown only in the absence of any statutory provision to the contrary. It is not suggested that there is any statutory provision on the point. A *saranjamdar* who takes possession of any *mirasi* or occupancy holding in this manner would hold it wrongfully and adversely to the Crown. As a possible mode of acquisition, it must be recognized; but I do not think that that possibility can help us in the decision of this case, because if the Crown claim to have acquired a right to any of these lands on the ground that the holders died without leaving any heir, it must be alleged and proved. See *Gridari Lall Roy* v. *The Bengal Government* (1) and *Secretary of State for India* v. *Haibatrao Hari* (2). Without any proof of that plea with reference to any particular holding, the mere possibility of the lands being acquired in that way by the *saranjamdar* could not help us in this case. I refer to this circumstance because the learned Counsel for the appellant has argued that it is possible that the Crown is entitled to the *mirasi* or the occupancy right of these lands and that if that possibility is not excluded by the plaintiff definitely proving that the lands have been otherwise acquired, they must be treated as acquired in that wrongful manner by the *saranjamdar*. Issue No. 2, no doubt, has been framed in the terms in which these possibilities have been stated in the Commissioner's order and repeated in the plaint. But the learned Judge distinctly records his finding on that issue in the sense indicated in his judgment. I accept the finding in the sense indicated by the learned Judge in his judgment, subject to the reservation that really the occupation by the *saranjamdar* of the lands in those cases where the Crown would be the ultimate heir would be wrongful, and that under the circumstances the fact that Raghunathrao was found to be the *khatedar* in 1884 and 1886 must be attributed more reasonably to a legal origin, and not to a wrongful act on the part of the *saranjamdar*. Even if it be assumed that the *saranjamdar* would be entitled to the holding on the basis that the *mirasi* right becomes extinct, when the holder dies without heirs, and that there is no *mirasi* right left, it is clear that the land would be in the same condition as any other land which has been relinquished; and the result would be same so far as the *saranjamdar's* right to dispose of it is concerned. In that view of the matter, the other possibilities left are that

(1) 12 M. I. A. 448 at p. 454; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 3 Mad. Jur. 386; 20 E. R. 408; 1 Ind. Dec. (N. S.) 28 (P. C.)

(2) 28 B. 276 at p. 283; 6 Bom. L. R. 43.

the lands may have been acquired either in consequence of relinquishment on the part of the holders or in consequence of forfeiture for non-payment of the royal share of the revenue or any other like cause. It may be mentioned in connection with this point that Ex. 137, which is a statement of the village officers recorded in September 1894, mentions all the numbers in suit, and some more numbers as really having been in the occupation and *khata* of Annasaheb Vinchurkar. This statement was recorded after the death of Raghunathrao, and at the date of the statement these lands stood in the name of Shivdeorao, *i. e.*, the adopted son of Raghunathrao. The statement with reference to Nos. 92 and 99 does not concern us. With regard to one of the numbers in suit, *viz.*, 201, it is stated that it formerly stood in the name of Dhondi *valad* Mahipati Avad, and as he did not pay its assessment, Annasaheb got the number transferred from his name to his own name about eight or nine years ago. With regard to all the other lands, it is stated that they stood in the name of Annasaheb for the last 25-30 years. The two village officers state that they do not know how the lands were acquired. Thus all that we know about these numbers is that it cannot be ascertained on this evidence as to when and how they were acquired. But we know that they have been in the possession of the plaintiff and his predecessor-in-title for several years as *khatedars*.

[His Lordship after disposing of the plea of adverse possession and estoppel as not established against the defendant went on:] The only point that remains to be considered is the point involved in issue No. 6 in the lower Court. This point has formed the subject-matter of interesting arguments before us. It may be mentioned at the outset that in this case it is an admitted fact that the *saranjam* was a grant of the royal share of the revenue, and not of the soil. If it were a grant of the soil, the Government can resume the soil; and in that case the decision of their Lordships of the Privy Council in *Secretary of State for India* v. *Laxmi Bai* (3) would clearly apply. It is urged, however, that even in a case where the grant is of the royal share of the revenue, when the Government resume the grant, they are entitled not only to the royal share of the revenue but also to such occupancy rights as the *saranjamdar* may have acquired during the continuance of the grant for his own personal benefit. That is the argument which, it is urged by Mr. Coyajee, was advanced by Sir George Lowndes before their Lordships of the Privy Council in *Secretary of State for India* v. *Laxmi Bai* (3) and that is the argument which is now urged before us. It may be mentioned that in that case the point decided was whether the *saranjam* was a grant of the soil or of the royal share of the revenue on the facts of that case. It was decided that it was a grant of the soil, and on that basis the decision of this Court was overruled. A further question was raised in the arguments for the appellant in that case but it is difficult to say that the question which arises for our decision in this case was considered and decided in that case. Mr. Coyajee has not urged that the point that we have to decide is covered by the judgment of their Lordships of the Privy Council, but has suggested that the point which the learned Counsel for the respondent in that case was supposed to have given up, was exactly the point which he now urges before us. If I felt sure that that was the point given up I should practically accept it as decisive of the point. But it is not at all clear from the judgment that that was the point given up. The plaintiff in that case claimed in the alternative his right to hold the lands, whether the grant was of the royal share of the revenue or of the soil. Their Lordships quote this clause from the plaint and refer to '*raitava* rights' with regard to the occupation of lands which were unoccupied at the date of the grant. Then it is stated that the latter claim, *i.e.*, the claim with regard to the occupation of lands not occupied at the grant, was abandoned. This would apparently refer to the claim made in the plaint that *even if it was a grant of the soil*, the plaintiff would have a right to hold the lands. That point appears to me to have been given up. Looking to the arguments of the learned Counsel for the respondent as reported and to the judgment, I cannot say that it was considered and decided that even if it was a grant of the royal share of the revenue, the plaintiff could have no '*raitava* rights' in the lands not occupied at the date of

(3) 72 Ind. Cas. 898; 50 I. A. 49; 25 Bom. L. R. 527; (1923) A. I. R. (P. C.) 6; 17 L. W. 405; 44 M. L. J. 471; 32 M. L. T. 111; 37 C. L.J. 464; 47 B. 327 at p. 330; 28 C. W. N. 49 (P. C.).

the grant. The principal point argued and decided in the case was whether the grant was of the royal share of the revenue only or of the soil. I read that judgment as deciding that where there is a grant of the soil all the rights of the occupancy which have accrued with reference to lands unoccupied at the date of the grant during the continuance of the grant must go with the grant as part thereof when it is resumed. But I am unable to read that judgment as deciding that even though it be a grant of the royal share of the revenue, any *mirasi* or occupancy right howsoever acquired by the *saranjamdar* over the land during the continuance of the grant must go with the grant when the grant is resumed.

It is, therefore, necessary for us to consider whether, when the Government resume a grant, which is a grant of the royal share of the revenue, they can acquire the *mirasi* or the occupancy right, which is a heritable and transferable right, in certain holdings, of which the *saranjamdar* has become the *khatedar* during the continuance of the grant. I may mention that the lands in suit are not stated on either side to be unoccupied lands at the date of the original grant, though it makes no difference in the view accepted in this Court whether they were unoccupied or not. If in the case of unoccupied lands the *saranjamdar* or *inamdar* could acquire occupancy rights for his own benefit, *a fortiori* he could retain those rights, if acquired from others who had similar occupancy rights at the date of the grant. The view taken by the Court in this Presidency during the last fifty or sixty years has been that when the Government resume a grant of the royal share of the revenue, they can resume what they granted, namely, the royal share of the revenue and nothing more. In the case of *saranjam*, it was so held in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (4) by Sargent, C. J., and Mr. Justice Birdwood. A reference was made to the Government Resolution of May 27th, 1854, in which the meaning of the word "resumption" was indicated. It is pointed out in that resolution that any person in the occupation of land will not be disturbed in his possession so far as he pays the assessment according to the Revenue Survey Settlement, or in districts which have not been subject to the operations of a survey, according to the rights obtainable in the village in which the land is situated. According to this resolution it was held in *Vishnu Trimbak* v. *Tatia* (5) that when the Government resume the *inam* they can only resume the right to levy full assessment, and could not take possession of the land. After referring to the said resolution and the case of *Vishnu Trimbak* v *Tatia* (5), the learned Chief Justice observed as follows (page 116*):—"In the present case we are concerned with a *saranjam*, and not an *inam*; but no legislative enactment or Government Resolution has been cited in support of there being any difference between the tenures as regards the effect of resumption by Government." In that very judgment at page 117* of the report the observations of Mr. Justice Melvill in *Ramchandra Mantri* v. *Venkatrao* (6) that the "*saranjamdar* may deal with all unoccupied lands as may be best for the purposes of revenue, and may either cultivate them himself or through tenants" are referred to, and explained as meaning that the *saranjamdar* may acquire occupancy rights, which remain unaffected by the resumption of the *saranjam* except as to the assessment thenceforth payable to Government. This view was affirmed by Sargent, C. J., and Nanabhai Haridas, J., in *Hari Sadashiv* v. *Shaik Ajmudin* (7).

There have been several cases with reference to *inams* in which the view as to the effect of resumption as indicated in the Government Resolution of 1854 has been followed, and in the two cases above cited it has been held that if the grant be of the royal share of the revenue only there is no difference between a *saranjam* grant and an *inam* grant as to the meaning of 'resumption' It is perfectly true that in the case of a *saranjam* grant the *saranjamdar* holds it for his life, and on his death the grant is liable to be resumed. That would not be so in the case of an ordinary *inam*. But this distinction existed much when the case of *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (4) was decided as it exists now and it could not have been ignored by the learned Judges who decided these cases. In fact the observations of Mr. Justice Melvill

(4) 10 B. 112; 5 Ind. Dec. (N. S.) 460.

(5) 1 B. H. C. R. (A. C. J.) 22.
(6) 6 B. 598 at p. 608; 3 Ind. Dec. (N. S.) 854.
(7) 11 B. 235 at p. 240; 6 Ind. Dec. (N. S.) 154.

*Pages of 10 B.—[*Ed.*]

in *Ramchandra Mantri* v. *Venkatrao* (6), have been always understood in this Presidency as giving the *inamdar* or *saranjamdar* a right to use the land to his best advantage including the right to create occupancy or *mirasi* rights in his favour, as forming part of his private property subject to the payment of assessment or the royal share of the revenue. It is only during recent years that with regard to *saranjams* the correctness of this view has been questioned on behalf of the Government. It was questioned in the case of *Gururao Shirinivas* v. *Secretary of State for India* (8) which went up in appeal to the Privy Council, and in which the decree of this Court has been set aside.

In this Presidency there had been a long course of decisions on two distinct points, first, that in the absence of any evidence to prove that the grant is of the soil, the presumption is that the grant is of the royal share of the revenue, and secondly, that in the case of a grant of the royal share of the revenue, it is open to the grantee to make the best use of the grant for his own benefit that is to appropriate lands to his own use, subject to the payment of the royal share of the revenue, and to create rights of occupancy in his own favour, or in favour of third parties. Subject to the payment of the royal share of the revenue, all the rights in the land could be acquired by him and would belong to him, if so acquired ; and the resumption of the grant would mean the resumption of what the Government granted, *i.e.*, the royal share of the revenue, and not any other right which the grantee during the continuance of the grant could acquire for himself and for the benefit of his heirs. The decision in *Secretary of State for India* v. *Laxmi Bai* (3) and the other decisions of their Lordships of the Privy Council which have been referred to in that case, definitely overrule the view taken on the first point, relating to the presumption, as to the nature of the grant subject to the observations on that point in the judgment, namely, that " it must be determined in each case upon the facts what was the quality of the original grant, although it may well be that it is ordinarily a grant of the royal revenue only " (page 55*). As regards the second point, as I read that judgment, there is no decision of their Lordships of the Privy Council; and we are left with the course of decisions of this Court on that point exactly as it was when the judgment in that case reported as *Gururao Shrinivas* v. *Secretary of State for India* (8) was pronounced.

Apart from the decisions, it seems to me that on principle in the case of a grant of the royal share of the revenue, when the grant is resumed all that the Government can fairly claim and would be entitled to, would be the royal share of the revenue. Whether the grant is in the nature of *saranjam* or *inam*, the grantee would be entitled to all the incidental benefits of the grant, namely, the right to acquire the occupancy rights in lands either not occupied or held by others and forfeited on one ground or another or otherwise acquired from the holders. The mere fact that the *saranjamdar* is in a sense a life-tenant does not, in my opinion, alter the ordinary incidents of a grant by way of *saranjam*. The determination of the exact rights of a *saranjamdar* appears to me to be more a question of the connotations of a *saranjam* grant than of applying the analogy of a life-estate, subject to all the limitations to which an ordinary life-tenant could use such estate.

The course of decisions in this Presidency has been in favour of the view which I have already indicated and in the absence of any definite decision on the point to the contrary, it seems to me that that view should be followed in this case. I may mention that in *Balvant Ramchandra* v. *Secretary of State for India* (9) decided by Sir Lawrence Jenkins, C. J., and Batchelor, J., it is pointed out (page 437*) that "since Melvill, J.'s judgment in 1882 the law in this Presidency has always been that a grantee of the revenue is entitled to make such profit as he can out of unoccupied lands" and a reference is made to the cases of *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (4), and *Rajya* v. *Balkrishna Gangadhar* (10).

I refer to these observations to indicate how for a long time in this Presidency this has been the accepted view with regard to *inams* and *saranjams*. In 1854, when Government issued their Resolution under Act XI of 1852, the inquiries under that Act were not confined to *inams* only, but

(8) 39 Ind. Cas. 65; 41 B. 408; 19 Bom. L. R. 117.

*Page of 50 I. A.—[*Ed.*]

(9) 32 B. 432; 10 Bom. L. R. 531.

(10) 29 B. 415 at p. 420; 7 Bom. L. R. 439.

*Page of 32 B. - [*Ed.*]

related to other grants also. The preamble to the Act shows that the inquiries under the Act were contemplated with reference to claims against Government on account of *inams* and other estates wholly or partially exempt from payment of land revenue; and the provision for making rules relating to *saranjams* is to be found in that Act in cl. 10 of Sch. B to that Act.

It has been urged on behalf of the appellant that the provisions of s. 90 of the Indian Trusts Act should apply to this case. Under that section where a tenant for life, by availing himself of his position as such, gains an advantage in derogation of the rights of other persons interested in the property, he must hold, for the benefit of all persons so interested, the advantage so gained. It is no doubt true, as I have already stated, that a *saranjamdar* is in a sense a tenant for life. But during the continuance of the grant he occupies no fiduciary position with reference to the grantor or any other person and it seems to me to be perfectly consistent with his life-estate to hold that the *saranjam* grant gives him the right to make the best possible use of the lands in the village or of the occupancies that may come to be dealt with by him for his own personal benefit. His position is not exactly the position of that of a tenant for life. But even if it be, it seems to me when he so uses the land for his own benefit, or acquires the occupancy and *mirasi* rights in the land for his own benefit, he does not act in derogation of the rights of other persons interested in the property. The person interested in the *saranjam* is the Government and the right of the Government is limited to the royal share of the revenue. If we take the successors to whom the *saranjam* may be re-granted as persons interested, it does not derogate from their rights, which are limited to the royal share of revenue. The acquisition of such personal rights of occupancy does not appear to be in derogation of the rights of others. The right of the *saranjamdar* as such is limited to the royal share of the revenue, subject to the existing occupancies in the village and it cannot be said that the *saranjamdar* acts in derogation of the rights of others by acquiring occupancy or *mirasi* rights for himself. In this view of the matter the English decisions which give effect to the principle underlying s. 90 of the Indian Trusts Act as regards tenants for life acquiring certain interests during their tenancy do not appear to me to apply to a *saranjam* grant.

The learned Counsel for the appellant has also relied upon the analogy of s. 108 of the Transfer of Property Act so far as it relates to the rights and liabilities of a lessee. As regards this argument also, it seems to me that the real difficulty in the way of accepting it is that the analogy does not appear to me to be correct. A *saranjam* grant carries with it certain incidental benefits to the grantee personally which an ordinary lease or a tenancy for life would not give.

It is necessary to add a word with reference to the rules made with regard to *saranjams* by the Government in 1898. This particular *saranjam* was resumed in 1892, after the death of Raghunathrao in 1889, and there were no rules then. But the rules as framed in 1898 do not in effect state anything more than what were ordinarily known to be the customary incidents of a *saranjam* grant. There is nothing in the rules which is inconsistent with the view that in the case of a *saranjam* grant of the royal share of the revenue only, the resumption could not mean anything more than the right to take the royal share of the revenue. Though the learned Trial Judge decided this case at a time when he was not only entitled but bound to follow the decision in *Gururao Shriniwa's case* (8) which has now been reversed, even now it seems to me that the only course that we can adopt is to follow the course of decisions of this Court on this point quite apart from the view taken by this Court in *Gururao Shrinivas* v. *Secretary of State for India* (8).

The result, therefore, is that the defendant's appeal must fail.

Then there is the appeal of the plaintiff. In support of the appeal it is urged that the lower Court is wrong in limiting her rights to one-third share in the lands. On this point the learned Judge has been influenced by the evidence of the only witness, who was examined in the case. V. G. Deshpande. He held a general power-of-attorney from Shivdevrao, and knew the facts relating to these lands. The learned Judge has relied upon his statement that "Vithal Keshav has a share in the first five lands in the suit. He has a sixth share. There are also other sharers. The

plaintiff's share is one-third in lands A—E. But no one has a share in the rest of the land. That is so under some relinquishment in a partition." He has also stated in his evidence that "the plaintiff has the right of possession and enjoyment of fields A—E though other persons have shares in the income." Upon this evidence the learned Judge has come to the conclusion that the descendants of the other two brothers of Raghunathrao are entitled to shares in this land. There was no issue on this point. There was no suggestion in the written statement that the plaintiff's interest in the lands was limited in that sense, and the other persons are not parties to the present litigation. It seems to me that the objection as to the defect of parties, which would arise necessarily if the learned Judge's view were correct, could have been, and should have been, taken by the defendant if this point was to be made, at an early stage of the suit. In fact it was not taken and under O. 1, r. 13 it must be taken to have been waived. The plaintiff was in possession at the date of the order in question, under which she was dispossessed of some lands and full assessment was levied in connection with the other lands. If that order is not right, then it seems to me that the plaintiff is entitled to a decree for possession of the lands which have been taken from her possession and for a return of the rent which has been levied from her in excess of the assessment payable in respect of the lands which are still in her possession. At the same time it is desirable to make it clear that the decree in favour of the plaintiff must be without prejudice to the rights, if any, of the co-owners in these lands.

I would accordingly dismiss Appeal No. 245 of 1920 and allow Appeal No. 281 of 1920, and vary the decree under appeal by deleting all references to one-third share of the plaintiff in the lands, and directing that all reliefs granted to the plaintiff should operate fully in favour of the plaintiff without the limitation as to one-third share. This variation to be without prejudice to the rights, if any, of other co-owners in the lands in suit. The defendant to pay the costs of the plaintiff throughout including the costs of the translations.

Fawcett, J.—[His Lordship endorsing the view expressed by Shah, Ag. C. J., that the rights were not acquired by purchase went on:] As to how the suit lands came to be shown in the *khata* of the deceased *saranjamdar* or of the original plaintiff, I agree with the view taken by the learned District Judge that all these survey numbers came to be put in the name of the *saranjamdar* or the plaintiff either on account of the line of *khatedars*, who were previous tenants, becoming extinct, or a tenant relinquishing his holding or his losing it by sequestration for non-payment of land revenue. Exhibit 137 is, in my opinion, important and reliable evidence to this effect. Survey No. 201 is there stated to have been acquired by forfeiture in about 1885, and the probabilities are that the lands in suit were similarly acquired: *cf.* the reference to Survey Nos. 92 and 99 in Exhibit 137. I also agree with Mr. Coyajee that issue No. 2 is properly drawn on the pleadings. Paragraph 3 of the plaint puts up the alternative case that the land must have gone into the possession of the plaintiff's ancestors by reason of the extinction of the *khatedar's* family or by reason of its resumption for arrears of assessment, and para. 4 of the written statement similarily refers to the *saranjamdar's* right to hold lands that had passed into the possession and enjoyment of the family by the death of the *khatedar* without leaving any heir or by forfeiture In my opinion, therefore, the issue was properly based on these two methods of possible acquisition. But acquisition through the lands being relinquished by a tenant may, in my opinion, be held to be covered by this particular issue, as the acquisition of lands in this way is on a similar footing to acquisition by extinction or forfeiture. My learned brother is of opinion that the case of lands becoming vacant owing to the extinction of the line of any family that previously held it as *mirasdars* is on a different footing to the case of lands acquired by relinquishment or forfeiture, and that in such a case the lands would escheat to the Crown and the possession of the *saranjamdar*, if he took the lands, would be wrongful. I do not myself think it necessary to decide this point in the present case, and I feel some doubt whether it would not be more correct to say that, as the occupancy of the land would be only a limited interest, it would not escheat to the Crown, but revert to the grantor of the occupancy, *i. e.*, the *saranjamdar*, *cf.*

Tulshi Ram Sahu v. *Gur Dayal Singh* (11) In any case it seems to me that there would be good ground for the contention that the Crown in such a case recognized the right of the *saranjamdar* to dispose of the vacant lands in the same way as any other vacant land that might be in the village, just as in an unalienated village the Collector has power to dispose of the occupancy in such a case under s. 72 of the Bombay Land Revenue Code.

Issue No. 2 covers not only the question whether the plaintiff proves that his ancestors so acquired the land, but whether they "became owners" thereof.

The only remaining point is the one, which in the lower Court led to issue No. 2 being answered in the affirmative and issue No. 6 in the negative, and which has been the main one argued before us. I shall first deal with this as if it were *res integra*, and give my opinion on the merits of the dispute untrammelled by any authority of this Court. The question is as to the excess profits over and above the assessment, which are obtained from these particular lands. This is the market rent which the Commissioner in his order Ex. 5 directed the Collector to ascertain and recover from the plaintiff, or from the occupants, who had been put in possession by the plaintiff or his predecessor, the last *saranjamdar*. In the case of the first five survey numbers (A) to (E) of the plaint the average yearly income obtained by the plaintiff before the resumption is stated by the witness Ex. 176 to have been Rs. 1,200, and in the case of the numbers shown as (H) to (K), which are still in plaintiff's possession, Government are said to have been exacting Rs. 112-6-0 more than they used to do. Some of the documents on record contain statements that part of the first five numbers, *viz.*, 2, 118, 119, 120 and 121 had in fact been actually sold by the last *saranjamdar* to third parties for building houses, and other portions were leased on rent for the same purpose: see Exs. 138, 152, 153 and 154. The *saranjamdar* in fact obtained increased profits from these lands in the same way as a Collector obtains them where land assessed as agricultural land is subsequently diverted to non-agricultural purposes under ss. 48, 65 and 66 of the Bombay Land Revenue Code. It also appears that a part of the remaining five numbers, which were not included in the village site, is used for non agricultural purposes: see Exs. 138 and 143. The disposal of these particular lands in this way, *viz.*, upon the original occupancies being relinquished or extinguished putting them in his own name and subsequently selling or leasing them for building or other non-agricultural purposes, is a disposal, which, in my opinion, is solely due to the *saranjamdar* availing himself of his powers as *saranjamdar* which include not only a power to take the assessment but also a power of management in regard to the village lands, enabling him to put unoccupied lands to the best possible use. The question is whether the advantage so obtained is one that is part of the *saranjam* estate, which can be resumed by Government, or whether the *saranjamdar* by his action in entering the lands in his own *khata* acquires a private right to the occupancies, which cannot be resumed by Government, and which descends to his own heirs, although they may not succeed to the *saranjam* grant. In my opinion, the answer to this question is that, the occupancies having been obtained by him *qua saranjamdar*, and not in the exercise of any private mode of acquisition such as a purchase from the original occupant, the occupancies must be treated as part of the *saranjam* estate and liable to resumption by Government. The case in fact seems to me to be practically on the same footing as if the *saranjamdar* had alienated a part of the *saranjam* estate by giving a permanent lease of these particular lands to a third party. It is, I think, indisputable that a sale of part of the *saranjam* estate by a *saranjamdar* is invalid as against his successor or Government as the reversioner: see *Gulabdas Jugjivandas* v. *Collector of Surat* (12) and it seems to me quite clear that where the *saranjamdar* instead of selling the lands gives a permanent lease of them, by which his heirs get an increased revenue, the case is on the same footing as a sale: compare *Madhavrao Waman Saundalgekar Deshpande* v. *Raghunath Venkatesh Deshpande* (13). I may also refer to *Nainapillai Mara-*

(11) 7 Ind. Cas. 231; 33 A. 111 at p. 116; 7 A. L. J. 1011 (F. B.).

(12) 3 B. 186; 6 I. A. 54; 3 Sar. P. C. J. 889; 2 Ind. Dec. (N. S.) 125 (P. C.)

(13) 74 Ind. Cas. 362; 47 B. 798 at p. 801: 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 28 C. W. N. 857; 50 I. A. 255; 20 L. W. 218 (P. C.).

kayar v. *Ramanathan Chettiar* (14), where (in dealing with the case of a temple) their Lordships say (page 352*) that "except in a case of a such unavoidable necessity" (*i. e.*, a necessity justifying an alienation) "the *shebait*, the managers or the trustees of a temple, or the *mahant* of a *mutt* have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in favour of any one rights of permanent occupancy in the endowed lands." This principle seems to me to apply equally in the present case. I agree on this point entirely with the view taken by the learned District Judge, E. H. Leggatt, in the *hebil saranjam* case and cannot express it better than he has at page 32 of the paper-book in the Privy Council Appeal No. 169 of 1913, *viz.*, that "in the case of a *saranjam* grant of land revenue the lands in the occupation of the grantee *qua saranjamdar* are resumable with the *saranjam*, though, of course, he may have possession of the land by purchase of occupancy rights from occupants at the time of the grant, in which case he would be in possession *qua* occupant and not *qua saranjamdar*, or possibly in some other way he may have acquired a right to continue in possession." I agree also with his view that in the case of a *saranjam* grant of land revenue, the grant of land revenue is coupled with the right to make the best possible use of unoccupied land, and presumably the whole of this can be resumed (page 31 of the paper-book). The first part of this proposition is also adopted by the District Judge in this case, when he says in dealing with the sixth issue "it is not disputed that what the grant amounts to is that of the royal share of the revenue. But the grant also connotes certain powers of management." He then goes on to illustrate what is meant by these powers of management. It is quite clear that, apart from his position as *saranjamdar*, he would not be able to exercise these powers of disposal of lands on forfeiture, extinction of line or relinquishment, and as I have already mentioned, these are powers which are ordinarily reserved to a Collector under ss. 57, 72 and 37 read with s. 74 of the Bombay Land Revenue Code. Section 111 impliedly recognizes the exercise of such powers of management by an *inamdar* of an *inam* village and the Courts have long ago recognized this power: see *Ramchandra Mantri* v. *Venkatrao* (6). Then it is important to bear in mind that a *saranjam* is a life-estate and does not necessarily descend to the eldest lineal male heir : see *saranjam* rules 2 and 5. As laid down by the Privy Council in *Sheikh Sultan Sani* v. *Sheikh Ajmodin* (15) the question to whom a *saranjam* or *jaghir* shall be granted upon the death of its holder is one which belongs exclusively to Government to be determined upon political considerations.

It follows that the *saranjamdar* is a 'qualified owner' and I adopt the contention of Sir George Lowndes in *Secretary of State for India* v. *Laxmi Bai* (3) that s. 90 of the Indian Trusts Act, 1882, applies. A *saranjamdar*, by availing himself of his powers of management as *saranjamdar*, cannot, in my opinion, gain for himself and his heirs an advantage in derogation of the rights of Government and his successors to whom Government may see fit to re-grant the *saranjam*, and who are "other persons interested in such property" within the meaning of s. 90. Even if the indeterminate successors cannot be considered, Government clearly have a reversionary interest which represents also the interests of future successors to the *saranjam* estate and which cannot be ignored: compare *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (13) as to the corresponding interest and rights of the Crown in service *watan* lands.

This principle merely follows the English Law that a person holding a fiduciary position in relation to property cannot deal with the property for his own benefit, as to which reference may be made to Halsbury's Laws of England, Vol. XXVIII, page 48, Art. 93 and to Lewin's 'Trusts', 12th Edition, page 204. That principle covers the case of 'tenants for life' in relation 'towards those in remainder" *cf. In re Biss*, *Biss* v. *Biss* (16) per Collins, M. R. It seems to me that such a constructive trust clearly operates in the present case. The increased benefit gained by Sirdar Raghunathrao and subsequently by the plaintiff Shiv-

(14) 82 Ind. Cas. 226; 47 M. 337 at p. 352; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809 (P. C.).

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(15) 17 B. 431 at p. 456; 20 I. A. 50; 6 Sar. P. C. J. 52; 17 Ind. Jur. 100; 9 Ind. Dec. (N. S.) 281 (P. C.).

(16) (1903) 2 Ch. 40 at p. 56; 72 L. J. Ch. 473; 51 W. R. 504; 88 L. T. 403.

deorao was obtained by Raghunathrao having availed himself of his position as *saranjamdar* and thus getting the occupancies for himself without any payment to the previous occupants, and the resulting revenues should be held for the benefit of the *saranjam* estate under s. 90 of the Indian Trusts Act.

It is urged that, if *saranjamdar A* could give a forfeited or relinquished occupancy to *B* or *C*, why should he not give it to himself. But this, in my opinion, overlooks the fact that when *A* gives it to *B* or *C* the latter is subject to various liabilities (over and above the mere payment of assessment), of which the *saranjamdor* can take advantage in exercise of his powers of management. For instance if *B* or *C* uses the land for non-agricultural purposes, the *saranjamdar* can levy an increased rental on the analogy of ss. 65 and 66 of the Bombay Land Revenue Code. (Such increased assessment was in fact levied by the *saranjamdar* Raghunathrao: *cf.* Exs. 121 and 152). If this happens in the time of the successor of *A*, who gave the occupancy to *B* or *C*, such successor would benefit by it, whereas if *A* gives the occupancy to himself and the land is, therefore, treated as private property, *A*'s heir *D* will get all the future benefit instead of *A*'s successor as *saranjamdar*, if the latter is not his heir. What happens in such a case is this that the *saranjamdar*, instead of having a *mirasdar* or permanent tenant as the occupant, obtains the holding for himself and can then deal with land as his *sheri* or private land: see *Rajya* v. *Balkrishna Gangadhar* (10). He thereby gets a decided advantage; for, instead of only getting the assessment or customary rent, which cannot be enhanced except within strict limits, he is able to get the market rent and in favourable conditions a rack-rent. In an ordinary case, where *inamdar's* heir is necessarily his successor as *inamdar* no question of trust arises. But whereas in the case of a *saranjam* estate the successor may not be the *saranjamdar's* heir or (as in this case) Government resumes the *saranjam* and there is no successor at all, the principle of s. 90 of the Indian Trusts Act comes into play. The advantage gained must be held for the benefit of the *saranjamdars'* successors, or Government as the ultimate reversioner. The fact that the latter may still have left to them the benefit of the ordinary assessment is immaterial, *cf. James* v. *Dean* (17) which is summarized as follows in Lewin's Trusts, 12th Edition, para. 4, at page 203 —"Even where a testator was possessed of leaseholds, and devised all his interest therein to *A* for life, remainder to *B*, and the lease having expired in the testator's life time he was at his death a mere yearly tenant, it was held that *A*, having renewed the lease must hold it upon the limitations of the Will for the yearly tenancy was an interest capable of transmission by devise; and the tenant for life could not, by acting on the good-will that accompanied the possession, get the exclusive benefit of a more durable term." In that particular case *A*'s successors would still have got the yearly tenancy, but that did not prevent their being entitled to the more durable term, which had been obtained by *A*. To say that the *saranjamdar* "occupies no fiduciary position" towards Government or any other person seems to me, with due respect, to beg the question. For the grant, in my view and that of Mr. Leggatt in the Hebli case, is a grant of land revenue coupled with a power of management, enabling him to make the best possible use of unoccupied land. There is, in my opinion, an implied or resulting trust that such powers shall not be exercised in a way that will benefit the *saranjamdar's* heirs at the expense of future reversioners other than the *saranjamdar's* own heirs: and to that extent I say he "occupies a fiduciary position" towards his successors and Government. Also I think a successor is entitled to receive not only the assessment, which is the main part of the *saranjam* estate, but also the benefit of the increased profits obtainable from the power of management, which is part of the *saranjam* grant. I say, therefore, that, in appropriating such profits for himself and his heirs, a *saranjamdar* acts "in derogation of the rights of the other persons interested in the property" within the meaning of s. 90 of the Indian Trusts Act. Consequently I do not agree with the view of my learned brother that the power of resumption covers nothing more than the resumption of the right to take the royal share of the revenue. And even assuming that the grant is limited to a grant of the royal share of the revenue, I do not see why this should not cover any increase which, if the village was not

(17) (1805) 11 Ves. 383; 8 R. R. 178; 32 E. R. 1135.

alienated, the State could legitimately claim owing to agricultural lands being diverted to non-agricultural purposes as in the case of the lands that have been included in the village site of Manmad. Section 134 of the Bombay Land Revenue Code illustrates this right.

I would add that, with due deference I demur to the view taken in *Sakharam Gopal* v. *Trimbakrao Ramchandra Mantri* (18) that the *saranjamdar*" takes "an absolute interest in the subject-matter of the grant." This view is based on *Dosibai* v. *Ishvardas Jagjivandas* (19) which was a case of a *jaghir* held on quite different terms to a *saranjam* of the kind now in question, which is only a life-estate. It seems to me to be a contradiction in terms to speak of the *saranjamdar* as an absolute owner in those circumstances. Nor do I agree wih the view taken at page 704* of the same case that a resumption under the rules is only 'formal.' It may be very real, as is shown by this case. In face of r. 2 of the *saranjam* rules, how can it be said that the eldest lineal male representative is "entitled to succeed" as was said by Scott, C. J., in *Madhavrao Hariharrao* v. *Anusuyabai* (20). The rule distinctly says the contrary. Apart, therefore, from authority to the contrary, I would say that in view of this constructive trust issue No. (2) in the lower Court should be answered in the negative and issue No. (6) in the affirmative.

On the other hand I admit that the view taken above is opposed to contrary rulings by this Court, especially *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (4) and *Gururao Shrinivas* v. *Secretary of State for India* (8) which are both cases relating to *saranjams*. The decision of the Privy Council on appeal from the last named case in *Secretary of State for India* v. *Laxmi Bai* (3) has not, I think, definitely overruled the view taken by this Court in *Gururao's case* (8) (at page 433*) to the effect that, where the *saranjam* grant is a grant of the royal share of the land revenue, the Government cannot resume anything but that royal share, and that the right to the occupation of the land subject to the payment of the assessment can and does survive the resumption of the *saranjam*.

I do not agree with the view of my learned brother that the point referred to in the judgment of the Privy Council in *Secretary of State for India* v. *Laxmi Bai* (3) as having been "abandoned" before them apparently refers to the claim made in the plaint in that case that, *even if it was a grant of the soil* the plaintiff would have a right to hold lands. The phrase "*raitava* rights" in the passage quoted by their Lordships from the plaint in that case occurs in direct conjunction with the contention that "*saranjam* grant is a grant of the revenue only" and when the Privy Council speak of a "claim of this kind", they presumably refer to the claim made on that basis. It appears in fact that such a claim was asserted only *on that basis* both in the District Court and in the High Court. Thus in the District Judge's judgment at page 28 of the Privy Council record, line 20, it is said: "It is practically conceded that the grant in this case was of land revenue and not of the soil," and his findings at page 35, lines 36 to 41, and at page 40, para. 25, are on this basis. In the High Court the contention was put forward on the same basis (see the Privy Council record, page 90, line 34 *et seq.*) and the discussion of it proceeded only on that basis (*cf.* page 95, lines 40 to 45, and page 97, lines 13 to 17, and lines 39 to 52). When the Privy Council say "this *latter* claim has now been abandoned" they surely can only mean the claim made on that basis. This is corroborated by the report of the arguments for the respondent before the Privy Council as reported as *Secretary of State for India* v. *Laxmi Bai* (3). This contains the argument: "*If the grant was merely of the revenue* the plaintiff has the right to possession, although the Government can re assess." Sir George Lowndes met this by pointing out that the District Judge had found that there was no right of occupancy (*i. e.*, presumably the finding on the ninth issue), and he added that in the High Court it was not contended that that finding was wrong. I think this latter statement is erroneous, for clearly the High Court found that, on the basis of the *saranjam* grant being a grant of the royal share of the revenue, the plaint-

(18) 61 Ind. Cas. 40; 45 B. 694 at p. 703; 23 Bom. L. R. 314.

(19) 15 B. 222; 18 I. A. 22; 15 Ind. Jur. 154 & 281; 6 Sar. P. C. J. 10; 8 Ind. Dec. (N. s.) 150 (P. C.).

(20) 36 Ind. Cas. 505; 40 B. 606 at p. 611; 18 Bom. L. R. 768.

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iffs had a valid right to the occupancy, which could not be disturbed by Government. But this view may not have occurred to the learned Counsel for the respondent, and it may have been on this account that the claim under consideration was abandoned by him. In any case an abandonment by Counsel of this particular contention cannot, in my opinion, be taken as conclusive in the present case, or as adequate basis for holding that the Privy Council have decided against the view taken in *Gururao's case* (8) which I have already mentioned.

Therefore, merely on this ground that I am bound by previous decision of this Court, though I differ from these decisions on the merits so far as they affect the present case, I agree to the findings on issues Nos. 2 and 6 arrived at by my learned brother and in the decree that he proposes to make, based on these findings. Otherwise I should have dismissed the plaintiff's suit with costs throughout.

I also concur in allowing Appeal No. 281 of the plaintiff as regards the form of the decree. I think the principle followed in *Gangaram* v. *Bapusaheb* (21) applies to this case, and that the plaintiff should get possession of the suit lands, if she succeeds in the suit, subject to any rights of co-sharers therein. The case is one where the plaintiff as the principal co-sharer can, I think, legitimately sue alone to eject an alleged trespasser: *cf. Ahmad Sahib Shutari* v. *The Magnesite Syndicate, Ltd.* (22). No doubt the defendant might have objected to the other co-sharers not being joined as parties to the suit, *cf. Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad* (23) but no such objection was taken (although the Court appear to have suggested their joinder), and it must accordingly, under O. I, r. 13, of the C. P. C, be deemed to be waived.

K. S. D. *Decree varied.*

(21) 84 Ind. Cas. 508; 24 Bom. L. R. 826; 46 B. 1022; (1922) A. I. R. (B.) 354.

(22) 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598.

(23) 10 B. 32; 5 Ind. Dec (N. S.) 404.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 9 OF 1924.

April 20, 1925

Present:—Mr. Dalal, J. C.

Babu JANG BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

Babu TEJ BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition—Separation of one member—Jointness of other members—Conduct of parties.

A member of a joint Hindu family can separate himself from the other members of the family and the remaining co-parceners without any special agreement among themselves may continue to be co-parceners and to enjoy the properties as members of a joint family. [p. 551, col. 1.]

In such a case the fact that the remaining members continued to be joint may, if disputed, be inferred from the way in which the family business was carried on after the previous co-parceners had separated from them. [p 551, col. 2.]

Balabux Ladhuram v. *Rukhmabai*, 30 I. A. 130; 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.) and *Palani Ammal* v. *Muthuvenkatachala Moniagar*, 87 Ind. Cas. 333; 48 M. L. J. 83; (1925) A. I. R. (P. C.) 49; 6 P. L. T. 133; 21 L. W. 439; (1925) M. W. N. 330; 3 Pat. L. R. 126; 27 Bom. L. R. 735; 29 C. W. N. 846; 23 A. L. J. 746 (P. C.), referred to.

Appeal against the judgment and decree of the Subordinate Judge, Rai Bareli, dated the 29th September 1923.

Mr. *G. N. Misra*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.—The following pedigree will disclose the relationship between the parties:—

On the death of *Musammat* Indarpal Kuar

the plaintiff Jang Bahadur sued for possession of the property of her husband Bhagwant Singh on the ground of his being the nearest surviving reversioner. The property is at present in possession of the defendant Tej Bahadur and his two brothers. The defence was that Bhagwant Singh was a member of a joint Hindu family, with Sardha Bux Singh father of the defendant and that, therefore, *Musammat* Indarpal Kuar had no rights in the property, that on the death of Bhagwant Singh Sardha Bux Singh succeeded to the property by right of survivorship and that on the death of Sardha Bux Singh the defendants became owners. The learned Subordinate Judge of Rae Bareli accepted the defence and dismissed the suit This is a first appeal and on facts I have come to a contrary conclusion.

It was admitted that there was a partition in 1868. The case of the plaintiff was that all the three brothers Bishnath Singh, Kashi Bux Singh and Sheodat Singh, sons of Prithipal Singh, separated, while the case of the defence was that Kashi Bux Singh separated and Bishnath Singh and Sheodat Singh remained joint. The learned Judge of the lower Court relied upon an allotment paper (Ex. B-2) of 20th May 1868 prepared by certain arbitrators who were appointed to make a division. It is stated therein that the paper was the lot of Bishunath Singh, that Sheodat Singh and Bishnath Singh desired to remain joint, that 2¼ share of Domapur was, therefore, allotted to Bishnath Singh and that the share of household property belonging to Kashi Bux Singh was given to him. It was argued from this on behalf of the defence that Bishnath Singh and Sheodat Singh remained members of a joint Hindu family. Hazari Lal *patwari* who wrote out this paper has also given evidence for the defence to the same effect. This paper, however, is not sufficient to decide the question whether Bishnath Singh and Sheodat Singh remained together as tenants-in-common or as members of a joint Hindu family. Hazari Lal's statement also is not clear on the subject. It is true that a member of a joint family can separate himself from the other members of a joint family and that the remaining co-parceners without any special agreement among themselves may continue to be co-parceners and to enjoy as members of a joint family. In the present case no agreement between the brothers is produced. The paper produced is a note made by persons who made a division between the family members. In such a case the fact that the remaining members continued to be joint may, if disputed, be inferred from the way in which the family business was carried on after the previous co-parceners had separated from them. [See *Balabux Ladhuram* v. *Rakhmabai* (1) and *Palani Ammal* v. *Muthuvenkatachala Moniagar* (2).] In the present case the conduct after the death of Bishnath Singh of Bhagwant Singh and Sheodat Singh and after the death of Sheodat Singh of Bhagwant Singh and of Sardha Bux Singh is not sufficiently clear to lead to a definite conclusion. In the *wajib-ul-arz* (copy Ex. 14) the share of every brother in Gomapur is separately noted and the share of Bishnath Singh and Sheodat Singh is not noted jointly. This *wajib-ul-arz* was prepared subsequent to 1868 because the settlement ended in 1872. On the other side attention of the Court was called to the mortgage-deed (Ex. B-5) executed by Bhagwant Singh alone. Exhibit B-7 executed by Bhagwant Singh and Kashi Bux Singh alone. The mortgage-deed executed by Bhagwant Singh alone (Ex. B-5) in 1880 admittedly gives no indication of jointness between him and Sheodat Singh. Evidence, however, is sought from the report in the mutation case (Ex. B-4). It is there stated that Bhagwant Singh had executed the mortgage with the consent of Sheodat Singh. Even so, if Bhagwant Singh was really the manager of a Hindu joint family no such consent was necessary. Moreover the consent was presumed on hearsay evidence by the officer who wrote the report because it is stated that Sheodat Singh was not present. As to the mortgage (Ex. B-7) the area mortgaged was 400 *bighas* and need not have included the share of Sheodat. This is a mortgage of 1879. The mortgage of 1882 executed by *Musammat* Sheo Sahay is filed not for its own significance but to bring in a report by a Tahsildar (Ex. B-11). It is stated therein that Bishnath Singh and Sheodat Singh were *sharik hal* (joint at present). The question of their jointness or separation did not arise and the words do not

(1) 30 I. A. 130; 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

(2) 87 Ind. Cas. 333; 48 M. L. J. 83; (1925) A. I. R. (P. C.) 49; 6 P. L. T. 133; 21 L. W. 439; (1925) M. W. N. 330; 3 Pat. L. R. 126; 27 Bom. L. R. 735; 29 C. W. N. 846; 23 A. L. J. 746 (P. C.).

indicate that the two brothers were members of a joint Hindu family. On behalf of the respondent reference was also made to the *dastur dehi* (Ex. B-16) but the record is not conclusive. It only says that the business of *Musammat* Indarpal Kuar and Sardha Bux Singh was joint. According to the defendants *Musammat* Indarpal Kuar had no business whatsoever because she had no share in the property so the record cannot be said to help their cause.

After the death of Bhagwant Singh there is abundant evidence to prove that his widow, *Musammat* Indapal Kuar, held the property of Bhagwant Singh as a life-holder and that her name was not entered in the village record by way of consolation as is alleged by the defendants. In 1891 Sardha Bux Singh himself applied for partition of his own 6 *biswas* odd share (application Ex. 15). *Musammat* Indarpal Kuar was made a defendant along with Jang Bahadur. She on her own behalf applied on 1st June 1891 (Ex. 16) to have her share partitioned off and joined to the *Mahal* of Sardha Bux Singh. The partition was privately made. First of all the *jethansi* quarter share of *Musammat* Indarpal Kuar was taken out aud then three lots were prepared for each of the three co-sharers. Finally the lots of Indarpal Kuar and Sardha Bux Singh were put into one *mahal*. In the partition proceedings (Ex. 18) *Musammat* Indarpal Kuar is declared to be owner of $1\frac{1}{4}$ share with two others as owners of one share each. After the death of Sardha Bux Singh his widow *Musammat* Dhiraj Kuar was appointed guardian of her minor sons, the defendants to the present suit. She was appointed guardian of only the share of Sardha Bux Singh and not of the share entered in the name of *Musammat* Indarpal Kuar. On behalf of the respondents stress was laid on a joint application by Indarpal Kuar and *Musammat* Dhiraj Kuar to be appointed guardians in which the minor's property was stated to be 11 annas and odd, that is, the entire property taking out the share of the plaintiff Jang Bahadur (Ex. B-3). There is nothing to indicate how the property of the minors came to be stated as 11 annas and odd and no effect was given by the District Court to this application. In 1913 Tej Bahadur defendant applied for removal of Jang Bahadur from guardianship and there stated that 5 annas odd share belonged to him and his brothers 5 annas odd to Jang Bahadur and the rest to Indarpal Kuar (Ex. 3, dated 9th April 1913). Subsequently when Tej Bahadur and his brothers sued Jang Bahadur for accounts on 10th January 1918 (plaint Ex. 10) accounts were demanded only of the 5 annas and odd share. It is certain, therefore, that *Musammat* Indarpal Kuar was in actual possession of her share from 1908 onwards. She was actually appointed *lambardar* after the death of Sardha Bux Singh (Ex. 20) when certain properties were attached in execution of a decree against *Musammat* Indarpal Kuar, Tej Bahadur objected and stated that he was separate from the lady and that the attached property belonged to him and not to the lady (Ex. 11, dated 9th June 1917). Tej Bahadur did not enter the witness box to explain how he came to make such a statement if *Musammat* Indarpal Kuar was not life-holder of any property. The lower Court has accepted the defence version that all these transactions of partition and of resistance to attachment were fictitious. I am not prepared to accept that view. In partition proceedings it was definitely admitted that Sardha Bux Singh owned 6 annas share and there can be no doubt, as I have pointed out, that *Musammat* Indarpal Kuar was the real owner and not a nominal one of the property entered in her name in the *khewat*. One of the defendants Tej Bahadur himself accepted this position in his statement (Ex. 11) in a Court of Law.

I hold that there was separation between all the three brothers, Bishnath Singh, Kashi Bux Singh and Sheodat Singh and that Bishanath Singh and Sheodat Singh remained tenants-in-common and not members of a joint Hindu family after 1868.

To-day Pandit Gokaran Nath Misra, Counsel for the plaintiff, on behalf of the plaintiff was willing to accept a compromise to take half of the property in suit and leave the other half to the defendants. He rightly judged the position of affairs by stating that his client did not desire any family friction and that though his client was entitled to the entire property under the law, *Musammat* Indarpal Kuar lived all her life with the defendants and their father and grandfather, so the defendants had expectations to benefit by the property. The solution was a desirable one but all the defendants were not present in Court. On behalf of one defendant Tej Bahadur the respondents' learned Counsel was ready to accept the compromise. I was, however, not